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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

FATHER JOHN HENGLE, OUR LADY OF VICTORY CHURCH, AND THE CLEVELAND CATHOLIC DIOCESE,
Petitioners,

v.

BROTHER GABRIEL WARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS, STATE OF OHIO,
NINTH JUDICIAL DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a civil court erred when, over constitutional objections, it intruded into an employment dispute between a Roman Catholic Parish and an employee claiming, contrary to church authority, to be a Religious entitled to wear religious garb, and where the court ordered payment of money damages in the dispute in violation of rights protected under the First and Fourteenth Amendments.

RULE 29.6 STATEMENT

Petitioner Catholic Diocese of Cleveland has no parent corporation and has no nonwholly owned subsidiaries. Petitioner Our Lady of Victory Church is encompassed within the authority of the Catholic Diocese of Cleveland and has no independent subsidiaries.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF OHIO, NINTH JUDICIAL DISTRICT

Father John Hengle, Our Lady of Victory Church, and the Cleveland Catholic Diocese respectfully petition for a writ of certiorari to review the decision of the Supreme Court of Ohio, which in effect affirmed the judgment of the Court of Appeals, Ninth Judicial District, Summit County, Ohio, in this case. Because of the unanimity of this Court's controlling interpretation of the constitutional text, Petitioners also respectfully suggest that this case is an apt candidate for disposition by summary reversal.

OPINIONS BELOW

The decision of the Supreme Court of Ohio is reported at 81 Ohio St.3d 1510, 692 N.E. 2d 617 (1998), and reproduced in the Petitioners' appendix at 1a. The opinion of the Court of Appeals, Ninth Judicial District, Summit County, Ohio is reported at 76 Fair Empl. Pac. Cas. (BNA) 36 (1997), and reproduced in the Petitioners' appendix at 2a. The denials by the Court of Appeals of the parties' respective motions for reconsideration are unreported and reproduced in the Petitioners' appendix at 17a and 19a. The denial by the Court of Common Pleas, Summit County, Ohio, of Petitioners' Motion for Judgment Notwithstanding the Verdict is unreported and reproduced in the Petitioners' appendix at 21a. The Judgment Entry of the Court of Common Pleas is unreported and reproduced in the Petitioners' appendix at 22a. The Order of the Court of Common Pleas denying the parties' cross-motions for summary judgment is unreported and reproduced in the Petitioners' appendix at 24a.

JURISDICTION

The Supreme Court of Ohio declined jurisdiction to review Petitioners' claimed appeal of right, which raised two constitutional issues, ruling that the appeal did not involve any substantial constitutional question in a decision entered on April 22, 1998. That determination was a decision on the merits of the constitutional propositions raised on appeal from the decision of the Court of Appeals, Ninth Judicial District, Summit County, Ohio. Therefore, the decision of the Ninth Judicial District is a final, reviewable order.[1] Pursuant to 28 U.S.C.A. §1257., this Court has jurisdiction.

In conformance with Supreme Court Rule 29.4(c), the Petitioners have served upon the Attorney General of the State of Ohio a copy of this Petition for Writ of Certiorari challenging the constitutionality of Ohio Revised Code §4112.02.

RELEVANT STATUTES

Applicable federal authority includes the First and Fourteenth Amendments to the United States Constitution, which state in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . " U.S. Const. amend. I.

Petitioners' appendix at 25a.

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[1] *See R. J. Reynolds Tobacco Co. v. Durham County, North Carolina, et al.*, 479 U.S. 130 (1986); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Matthews, et al., v. Huwe*, 269 U.S. 262 (1925).

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

Petitioners' appendix at 26a.

Additionally, correlative federal anti-discrimination provisions, codified at 42 U.S.C.A. §2000e-1, have relevance to the issues presented for review, which state in pertinent part:

> "This subchapter [pertaining to Equal Employment Opportunities] shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C.A §2000e-1(a) (West 1994 & Supp. 1998).

Petitioners' appendix at 79a.

Applicable state law authority includes Ohio Revised Code Chapter 4112, specifically §4112.02, which states in pertinent part:

> "It shall be an unlawful discriminatory practice:
>
> (A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment. . . ." Ohio

Rev. Code Ann. § 4112.02 (Anderson 1998).

Petitioners' appendix at 37a.

STATEMENT OF THE CASE

Plaintiff Gabriel Ward, aka Edward Ward[2], contends that an Ohio state statute, specifically Ohio Revised Code §4112.02[3], vests in him the right to wear the habit of "a Religious", a member of a religious order recognized by Petitioner Catholic Diocese of Cleveland, while Plaintiff Ward works in the service of a Roman Catholic Parish, irrespective of the fact that Ward is not a member of such a recognized religious order and

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[2] While Respondent alternately identifies himself as "Brother Gabriel M. Ward" and/or "Father Gabriel M. Ward", names he personally adopted for religious purposes, his formal legal name is Edward Paul Ward. See Transcript of Proceedings, Vol. I, page 161, Petitioner's appendix at 293a. For this reason, Petitioners hereinafter reference him as Edward Ward.

[3] That provision states in pertinent part:

It shall be an unlawful discriminatory practice:

> (A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, conditions, or privileges of employment, or any matter directly or indirectly related to employment. Ohio Rev. Code Ann. §4112.02 (Anderson 1998).

While this statute is analogous to the correlative federal Title VII provision codified at 42 U.S.C.A. §2000e-2, Petitioners' appendix at 65a, it lacks the religious organization exemption codified at 42 U.S.C.A. §2000e-1 which applies to that federal enactment.

irrespective of the fact that Ward's wearing of said religious garb is contrary to the religious authority and practices of the religious entity employer. Petitioners Catholic Diocese of Cleveland, Our Lady of Victory Church and its Pastor, Father John Hengle, (collectively referred to hereinafter as the "Diocese of Cleveland") maintain that the First Amendment to the Constitution of the United States, as applied to the states through the Fourteenth Amendment[4], expressly prohibits a secular court from exercising jurisdiction to interpret and evaluate their religious policies and proscribes a state entity from prioritizing an employee's preference in workplace attire over the religion-based directives of a religious entity employer.

A. Pre-trial Proceedings

At all times relevant to the events preceding the instant dispute, Edward Ward worked in an administrative capacity at Our Lady of Victory Church, a Parish encompassed within the Diocese of Cleveland, Ohio, and led by Father John Hengle who is subordinate to the Bishop of Cleveland with respect to issues of Roman Catholic faith, morals and practice.

During some time period in the course of Edward Ward's employment relationship with Our Lady of Victory Church, he enjoyed limited recognition by the Diocese of Cleveland as a member of a provisional Roman Catholic religious community. When the Diocese of Cleveland withdrew its temporary sponsorship of the intended religious community and the Catholic Bishop in Brooklyn, New York, from whom Ward then sought and obtained temporary sponsorship subsequently withdrew his sponsorship of the intended religious community, Ward sought to continue wearing at Our Lady of Victory Church

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[4] *See Cantwell v. Connecticut*, 310 U.S. 296, 303(1940).

the religious garb[5] symbolic of a member of a recognized Roman Catholic religious order[6], essentially impersonating a Religious, despite the fact that he was not a member of any such group.

On June 28, 1994, Father Hengle advised Edward Ward that, through directive from the Bishop of Cleveland, Ward was prohibited from wearing the habit of a Religious while on church grounds and acting in the course of his employment with the Church. Additionally, Father Hengle informed Ward that he could no longer insist upon being addressed as "Brother". Both directives were conditions of Ward's continued employment with the religious entity. Edward Ward refused to comply with the requirements communicated by Father Hengle and the employment relationship in question terminated on that date.

Claiming that the Diocesan decision to prohibit him from misrepresenting himself as an authorized religious representative of the Roman Catholic faith constituted impermissible religion-based discrimination, Edward Ward initiated in the Ohio state court system litigation ostensibly predicated upon Title VII of the federal Civil Rights Act of 1964[7] and upon correlative state anti-discrimination legislation[8], seeking recovery of both compensatory and punitive damages. In his Complaint, Ward named Father John Hengle, Our Lady of Victory Church and the Diocese of Cleveland. Petitioners timely filed their Answer to the Complaint, asserting a series of affirmative defenses.

Petitioners subsequently submitted a joint Motion for

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[5] This garb consisted of a tunic, capuche, cord and rosary.

[6] These orders would include, among others, Franciscans, Dominicans, Jesuits and Maronites.

[7] 42 U.S.C. § 2000e *et. seq.*

[8] Ohio Revised Code §4112.02.

Summary Judgment on the basis that the First Amendment to the United States Constitution barred Edward Ward's claims.[9] Specifically, Petitioners highlighted the ecclesiastical nature of the controversy and excerpted deposition testimony from Edward Ward confirming the same. Citing United States Supreme Court authority, Petitioners negated the constitutionality of a secular court rendering judgment over competing religious views.[10] Edward Ward filed a Cross Motion for Summary Judgment. The trial court denied both.[11]

B. Trial

Jury trial commenced April 10, 1996. During the course of that proceeding, counsel for Petitioners elicited testimony from Edward Ward substantiating the doctrinal nature of the parties' dispute.[12] Witnesses who testified subsequently reiterated the doctrinal basis for the conflict.[13]

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[9] *See* Defendants' Motion for Summary Judgment and Memorandum in Support of Summary Judgment, reproduced in Petitioners' appendix at 84a. *See also* Reply Brief of Defendants in Support of their Motion [sic] Summary Judgment, and the Brief in Opposition to Plaintiff's Motion for Summary Judgment, reproduced in Petitioners' appendix at 108a.

[10] *See* Reply Brief of Defendants in Support of their Motion [sic] Summary Judgment and Brief in Opposition to Plaintiff's Motion for Summary Judgment, pages 1-11, reproduced in Petitioners' at 108a-121a.

[11] *See* Order, reproduced in Petitioners' appendix at 24a.

[12] *See* Transcript of Proceedings, Vol. I, pages 217-46, reproduced in Petitioners' appendix at 127a.

[13] *See* Transcript of Proceedings, Vol. II, pages 355-71 and 420-21, reproduced in Petitioners' appendix at 162a and 177a.

Both at the close of Respondent's case in chief and at the close of all the evidence, Petitioners moved the trial court for a directed verdict, specifically citing the First Amendment to the United States Constitution and the separation of church and state that said enactment prescribes.[14] The trial court overruled each Motion for Directed Verdict[15] and submitted the case to the jury. On April 15, 1996, the jury returned a verdict in favor of respondent Ward, finding violations of both the federal Civil Rights Act and the Ohio Anti-Discrimination Statute and awarding both compensatory and punitive damages, which the trial court reduced to judgment.[16] Contending that the trial represented an adjudication of religious doctrine and practice in violation of the First Amendment, Petitioners filed a Motion for Judgment Notwithstanding the Verdict[17], which the trial court overruled.[18] Petitioners then perfected an appeal to the Court of Appeals for Summit County, Ohio, Ninth Judicial District.

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[14] *See* Transcript of Proceedings, Vol. II, pages 357 and 362, reproduced in Petitioners' appendix at 165a and 169a.

[15] *See* Transcript of Proceedings, Vol. II, pages 370-71, reproduced in Petitioners' appendix at 176a.

[16] *See* Judgment Entry, reproduced in Petitioners' appendix at 22a.

[17] *See* Defendants' Motion for Judgment Notwithstanding the Verdict and Memorandum in Support of Defendants' Motion for Judgment Notwithstanding the Verdict, reproduced in Petitioners' appendix at 176a.

[18] *See* Judgment Entry, reproduced in Petitioners' appendix at 21a.

C. Appellate Proceedings

Petitioners specifically assigned as error the violation of their constitutional rights under the First Amendment to the United States Constitution, stating:

> Assignment of Error I.A. The Trial Court violated the First Amendment to the Constitution of the United States which prohibits Civil Courts from adjudicating controversies over religious doctrine and practice.[19]

> Assignment of Error III. The Trial Court erred and violated Defendants/Appellants' freedom of religion guaranteed by the First Amendment to the Constitution of the United States when it failed to grant Defendants/Appellants' Motion for a Directed Verdict made at the close of all evidence.[20]

The state appellate court prefaced its decision with the express acknowledgment that "it is true that the underlying dispute between Ward and the church was based on this Catholic doctrine," and that what "was relevant to this dispute was that there was a conflict between the church's doctrine and Ward's religion and that this conflict led to Ward's termination from

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[19] *See* Brief of Appellants, page ix, reproduced in Petitioners' appendix at 220a. *See also* Issues Presented for Review in the Brief of Appellants, page x, reproduced in Petitioners' appendix at xxa.

[20] *See* Brief of Appellants, page ix, reproduced in Petitioners' appendix at 221a.

employment".[21] While that court determined that the federal Civil Rights Act expressly exempted the Diocese of Cleveland, Our Lady of Victory Church and Father Hengle from its operation, it classified the trial court failure to enforce the exclusion of religious organizations from federal statutes as harmless error because the state anti-discrimination statute did not contain the same express religious exemption.

Because, in the opinion of the state appellate court, the state legislature intentionally omitted in its anti-discrimination statute exemption for religious organizations, the court refused to consider a constitutional challenge to rewrite that statute. The state appellate court therefore upheld the jury verdict against Petitioners, on the basis that a religious entity employer possesses no exemption from liability under the state law.

Petitioners sought discretionary review by the Supreme Court of Ohio, raising propositions of law rooted in their constitutional challenge to the violation of their First Amendment rights. Specifically, Petitioners argued:

> Proposition of Law No. 1: An Employment Decision Arising From a Doctrinal Dispute Within a Church Is A Matter Of Internal Church Governance And Cannot Raise, Because Of The First Amendment To The Constitution Of The United States, A Justiciable Issue for a Civil Court.
>
> Proposition of Law No. 2: A Church Has A

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[21] *See Ward v. Hengle, et al.*, 76 Fair Emp. Pac. Cas. (BNA) 36 (1997)(emphasis added), reproduced in Petitioners' appendix at 8a-9aa.

Constitutional Right To Make Certain Employment Decisions Based Upon Religious Considerations. Thus, There Must Be An Implicit Exemption For Religious Organizations Found In Ohio Civil Rights Act, R.C. §4112.01 Et. Seq.[22]

The Supreme Court of Ohio declined on April 22, 1998 to exercise jurisdiction to review the state court of appeals decision and/or Petitioners' constitutional challenge to the state statute.[23] In doing so, the state supreme court evidenced its disregard of the intrusion of the state's courts into matters of church doctrine and the prioritization of an employee's religious preferences over the free exercise of religion constitutionally guaranteed a religious entity employer.

REASONS FOR GRANTING THE WRIT

This case presents a direct conflict between the constitutional right of a religious entity to exercise autonomy in the determination of who appears as a representative of its religious order and the secular interests of a state legislature in preventing religious discrimination in the workplace. The Ohio state courts extended their jurisdiction into issues of admittedly religious domain and rendered a substantive decision which abrogated religious authority over a religious workplace. Such intrusion by the state is clearly in direct conflict with established precedent from this Court dating from the previous century and

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[22] *See* Memorandum in Support of Jurisdiction of Appellants, Father John Hengle, Our Lady of Victory Church, and the Cleveland Catholic Diocese, reproduced in Petitioners' appendix at 268a.

[23] *Ward v. Hengle et al,* 81 Ohio St.3d 1510, 692 N.E.2d 617 (1998), reproduced in Petitioners' appendix at 1a.

continuing to the present.[24] The state court action raises the issue of what limits the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment[25], imposes upon states when the rights of the religious entity employer and employee clash. While this Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) expressly declined to decide what mandates the Free Exercise Clause of the First Amendment prescribes for employment anti-discrimination legislation, the parameters of that doctrine are now ripe for determination in the instant case.

THIS CASE PRESENTS TWO IMPORTANT ISSUES OF CONSTITUTIONAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

While this Court has addressed previously conflict between religious entity employers, which have rights under the federal constitution, and employees, who possess certain protections under federal anti-discrimination legislation, no prior decisions clarify the scope and effect of First Amendment provisions on state anti-discrimination legislation or its enforcement. Because in the instant case, the state courts below have exercised jurisdiction in direct conflict with established constitutional principles articulated by this Court and in a manner that infringes

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[24] *See, Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, (1969); *Serbian Eastern Orthodox Diocese for the United States & Canada v. Milivojevich*, 426 U.S. 696 (1976).

[25] *See Cantwell v. Connecticut*, 310 U.S. 296, 303(1940).

upon the religious entity employer's constitutional right to free exercise of religion,[26] summary reversal should be considered by this Court.

In failing to recognize a necessary constitutional exemption to the state labor law, the decision below elevates the Ohio Statute above the guarantees in the First Amendment, and punishes church decision without regard for the established authority of the church to govern itself. Obviously the courts below have either blatantly disregarded this Court's controlling interpretations of the First Amendment, or were confused with regard to the required application of said interpretations to the state labor law. If this Court is at all unsure about the clarity of the law that is applicable in this situation, then it should grant this petition and set this case for argument.

The state appellate court which examined the instant case below expressly acknowledged that the conflict between Edward Ward and the appellants resulted from Ward's determination to dress as a monk and to identify himself as "Brother" without recognition from the Catholic Church, a practice which conflicted with church doctrine and authority.[27] The appellate court further noted that the evidence presented demonstrated that the allegedly discriminatory action of the Church and of Father Hengle was motivated by religious belief.[28] It can not be disputed that permitting an employee to falsely impersonate a Religious in a Roman Catholic Parish offends the doctrine,

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[26] An outcome which is possible in other states. *See, e.g.*, Alaska Stat. §18.80.220 (1997), and Va. Code Ann. §2.1-725 (1998), which anti-discrimination legislation lacks exemption for religious entity employers.

[27] *See* Petitioners' appendix at 3a-4a.

[28] *See* Petitioners' appendix at 14a.

practice and religious authority of the church to govern itself. Employing a strictly secular analysis limited to statutory interpretation of the specific state legislation, the appellate tribunal proceeded to exercise jurisdiction to resolve that Ward's practice of wearing religious garb did not interfere with his work, church business or parishioners' worship, in which case, the appellants had no constitutional basis to prohibit Ward's manner of dress and were liable under the state statute which incorporates no exemption for religious organizations.[29]. However, in doing so, the Ohio state appellate court unconstitutionally exceeded the scope of its jurisdiction and disregarded the substantive mandates of the federal constitution which apply to state legislation.

I. Where a secular court interprets and evaluates religious authority and practice that control which employees may appear as Religious while in the service of a Roman Catholic Parish, that court violates the First and Fourteenth Amendments to the United States Constitution as overwhelmingly provided in the settled law of this Court.

In a number of decisions, this Court has circumscribed the province of secular authorities to intervene in matters involving religious faith and functioning. *See e.g. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-446 (1969) (Determining that it is "wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions"). With respect to exercise of judicial jurisdiction, this Court has written:

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[29] *See* Petitioners' appendix at 8a-9a.

> "[W]e think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or **ecclesiastical rule, custom, or law** have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 U.S. 94, 113 (1952) (emphasis added). However, while this deferential directive has constrained Congress and the federal courts, which acknowledge the limitations imposed by the First Amendment to the federal Constitution and mandate separation between church and state, Ohio state courts have impermissably determined to participate in such disputes.

The decision rendered by the state court which considered below the instant dispute illustrates the hazards engendered by such improvident extension of secular jurisdiction. Specifically, that court acknowledged the intrinsic role played by church doctrine in the decision of the Diocese of Cleveland to require layperson Ward to discontinue dressing as a religious representative of the Roman Catholic faith.[30] That court acknowledged that the underlying dispute between Ward and the Diocese of Cleveland was based upon interpretation of Catholic protocol dictating who may dress as a monk. What that court

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[30] *See* Petitioners' appendix at 3a.

failed to acknowledge were the constitutionally mandated limitations on its secular intervention into the admittedly religious issues.

In essence, the state court made a value judgment on the Roman Catholic religious practice of allowing only employees who are members of a recognized religious order to wear the symbolic garb which identifies each as a Religious. In limiting its consideration to whether Ward's practice of wearing the habit interfered with his work, church business or parishioner worship, the Ohio state appellate court omitted critical constitutional consideration of whether Ward's practice contravened Roman Catholic doctrine, authority and clergy, there by burdening their free exercise of religion. This Court's long-standing previous pronouncements that secular courts do not and should not have jurisdiction to intervene in such disputes of faith, doctrine and religious expression or to express opinions evaluating the objective merits of such religious practice have been ignored by the courts below.

It is respectfully submitted that the First Amendment will not allow the Court below, nor a jury, to lawfully render an adverse judgment against the Petitioners on the issues raised by Respondent's complaint. A decision adverse to the Petitioners would materially alter their interpretation and practice of traditional church doctrine. Respect for the free expression and exercise of religion is a fundamental tenet of United States Constitutional law. In a decision that predates the First Amendment's application to the States through the Fourteenth Amendment, the United States Supreme Court held:

> . . . The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. ... All who unite themselves to such a body [the church] do so with an implied consent to

> [its] government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.[31]

Because in the absence of direct prohibition from this Court, the state courts below have exercised secular jurisdiction over constitutionally protected issues of religious doctrine, authority and practice, this Court should delineate definitively the parameters of appropriate review in state law based religious discrimination in employment cases involving religious entity employers.

II. In the absence of correction by this Court, the decision below which effectively prioritizes the religious preferences of an employee over the religious precepts and practices of a Roman Catholic Parish, will encourage other courts to act in violation of the rights of religious entities protected by this Court's previous decisions.

Deeply embedded in American constitutional jurisprudence is the mandate that government, state and national, must refrain

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31 *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871).

from intruding in matters of religious theory, doctrine, and practice[32]. The instant dispute places the required governmental neutrality in jeopardy.

Because there are no prior decisions of this Court directly addressing the enforcement of state employment legislation against religious entity employers and in view of there being a multitude of examples throughout this country, in which state trial courts are struggling to distinguish or apply United States Supreme Court precedent[33] definitive clarity is needed from this Court. Failure to address the unconstitutional acts of civil courts, inclusive of the decision below, encourages continuation of the same unconstitutional application of state legislation, resulting in the waste of religious entity resources as well as precious judicial time. The time is ripe for this Court to issue corrective action insisting that meaningful constitutional deference be given by courts applying state labor laws in employment disputes involving religious entities.

The case before this Court's consideration presents a scenario where the free exercise of religion rights of an employer and an employee squarely conflict. The Ohio State Legislature has not expressly exempted religious entity employers (perhaps believing it is unnecessary on account of this Court's rulings). The courts below have determined to resolve this conflict in

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32 *See, Watson, supra*, and the related cases at footnote 24.

33 *See, e.g., Alberts v. Devine*, 395 Mass. 59, 479 N. E.2d 113, *cert. denied*, 474 U.S. 1013 (1985); *Hayden v. Archbishop Francis Schulte*, 701 So.2d 1354 (La. App. 1997)(now in discovery in trial court); *Compare Higgins v. Maher*, 210 Cal. App.3d 1168 (1989), *cert. denied*, 493 U.S. 1080 (1990), *with Marshall v. Munro*, 845 P.2d 424 (Ak.1993).

favor of the employee, making the right of a religious entity employer to the free exercise of its religion a secular sacrifice.

The state appellate court concluded that the Ohio state legislature intentionally omitted from its anti-discrimination legislation the exemption for religious organizations expressly incorporated into the correlative federal anti-discrimination statutes.[34] Limiting its inquiry to the absence of an express statutory exemption for religious organizations, that court refused to consider whether the First Amendment, as applied to the states through the Fourteenth Amendment, required recognition of some implicit exemption for religious organizations to protect the free exercise of religion of those entities from the operation of state anti-discrimination statutes. Likewise, that court deemed unnecessary any meaningful constitutional analysis of the consequences of the legislation before it on the rights of the religious entity employer.

Case law from this Court would strongly suggest that such reverse discrimination violates constitutional principles. *See e.g. Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 73 S. Ct. 143, 154, 97 L.Ed. 120 (1952) (Free exercise of religion is guaranteed not only to individuals but also to churches in their collective capacities, which must have "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.") Yet, no definitive authority[35] expressly outlines the constitutional

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[34] *See* Petitioners' appendix at 8a.

[35] Justice O'Connor has noted that "the Court in the past has had some difficulty, even in the civilian context, in articulating a clear standard for evaluating free exercise claims that result from the application of general state laws burdening religious conduct." *Goldman v. Weinberger*, 475 U.S. 503, 530, 106 S.Ct. 1310, 1325, 89

requirements of the Free Exercise Clause as applied to anti-discrimination legislation when, as here, exercise of rights rooted in that First Amendment provision conflict.[36]

Irrespective of the fact that the state anti-discrimination legislation in question on its face appears to promote religious liberty, Supreme Court precedent confirms that the Free Exercise Clause extends beyond facial discrimination to forbid even subtle departures from neutrality and covert suppression of particular religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 113 S.Ct. 2217, 2227, 124 L. Ed.2d 472, ___ (1993). *See also Gillette v. United States*, 401 U.S. 437, 452, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971). First Amendment implications are raised in consideration of the effects of laws enacted. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 558, 113 S.Ct. at 2240, 124 L. Ed.2d at ___ (1993) (Scalia, J., concurring in part and concurring in the judgment). This acknowledges the practical reality that "[a] law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids." *Id.*, 508 U.S. at 561, 113 S.Ct. at 2241, 124 L. Ed.2d at ___ (1993) (Souter, J., concurring in part and concurring in the judgment). Such is the case in the dispute between Edward Ward and the Diocese of Cleveland.

Goldman v. Weinberger, 475 U.S. 503, 530, 106 S.Ct. 1310, 1325, 89 L.Ed.2d 478, ___ (1986) (O'Connor, J., dissenting).

[36] This Court noted in footnote 17 of *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) that it had, in that case, no occasion to rule upon whether the federal anti-discrimination legislation required inclusion of an express exemption for religious organizations.

The case *sub judice* reveals the burden upon religious practice placed by the Ohio legislation with respect to religion when that legislation is applied against a religious entity employer. In application, that statute permits an individual, here Edward Ward, to subvert the precepts and practices of an entire religion, here the Roman Catholic faith, by imposing his preference to wear Roman Catholic religious garb at his Roman Catholic place of employment despite the fact that he does not meet the requirements of that faith for the wearing of such attire. Ward's sanctioned use of the state law in question evidences the inherent non-neutrality of that provision and its subversion to suppression of a religious entity employer's religious beliefs. The instant case confirms that, as drafted, a state religious anti-discrimination statute, which omits some exemption for religious entity employers, still cannot be constitutionally applied in these circumstances.

The decision below is an oxymoron: a church is being punished as a religious discriminator for deciding who it will recognize as a monk. Ward aspired to a Canonical position within the Catholic Church, but he never achieved that status. When Ward refused to accept the authority of the church, and continued to represent himself as a monk, the church determined to end any appearance that the church authorized Ward's conduct. The question of who will be allowed to represent a church "is per se a religious matter" no matter what idiosyncratic factors are included in that determination.[37]

Unless this Court acts the Petitioners will be forced to pay money damages to the Respondent, who falsely claimed to be a Religious with an entitlement to wear the garb of a Religious in

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37 *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1355-57 (D.C. Cir.1990).

a Roman Catholic Parish. That decision is wrong and contrary to the U.S. Constitution. Only action by this Court can avert compounding the damage to the free exercise rights of Petitioners in controlling their workplace as to their own religious precepts.

CONCLUSION

The case *sub judice* presents this Court with the opportunity to fill a void in constitutional jurisprudence, affirming governmental neutrality with respect to both individual and organizational free exercise of religion. For the foregoing reasons, the petition for certiorari should be granted. This Court may wish to consider resolving this matter by summary reversal, due to the unanimity of its prior First Amendment decisions -- dating from the Nineteenth Century to the present.

Respectfully submitted,

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APPENDIX

APPENDIX A

81 Ohio St. 3d 1510 printed in FULL format.

Ward v. Hengle. 98-167.

SUPREME COURT OF OHIO 81 Ohio St. 3d 1510; 692

N.E.2d 617; 1998 Ohio LEXIS 1088

April 22, 1998, Decided

PRIOR HISTORY: [*1] Summit App. No. 18234.

JUDGES: Moyer, C.J., Resnick and Lundberg Stratton, JJ., dissent. Resnick and Lundberg Stratton, JJ., dissent.

OPINION: DISMISSALS, SUA SPONTE, NO SUBSTANTIAL CONSTITUTIONAL QUESTION AND DISCRETIONARY APPEALS, IF APPLICABLE, NOT ALLOWED

On appeal of Father John Hengle et al. Appeal denied.

Moyer, C.J., Resnick and Lundberg Stratton, JJ., dissent.

On cross-appeal of Brother Gabriel Ward. Cross-appeal denied.

Resnick and Lundberg Stratton, JJ., dissent.

APPENDIX B

2ND CASE of Level 1 printed in FULL format.

BROTHER GABRIEL WARD, Appellee v. FATHER JOHN HENGLE, et al., Appellants
C.A. NO. 18234

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT COUNTY 1997

Ohio App. LEXIS 5472; 76 Fair Empl. Pac. Cas. (BNA) 36

December 10, 1997, Decided

PRIOR HISTORY: [*1] APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT. COUNTY OF SUMMIT, OHIO. CASE NO. CV 94 10 3522.

DISPOSITION: Judgment affirmed in part, reversed in part, and the cause remanded.

COUNSEL: ORVILLE L. REED, III, and STEVEN R MALYNN, Attorneys at Law, Akron, Ohio, for Appellants.

RICHARD E. DOBBINS and NICHOLAS SWYRYDENKO, Attorneys at Law, Akron, Ohio, for Appellee.

JUDGES: LYNN C. SLABY, Judge. QUILLIN, P. J.,

Ward v Hengle, et al. - C.A. No. 18234

BAIRD, J., CONCUR.

OPINION BY: LYNN C. SLABY

OPINION:
DECISION AND JOURNAL ENTRY

Dated: December 10, 1997

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Judge.

Appellants, Father John Hengle, Our Lady of Victory Church, and the Roman Catholic Diocese of Cleveland (collectively "the church"), appeal from a judgment of the Summit County Court of Common Pleas in favor of appellee, Brother Gabriel Ward, on his religious discrimination claim. We affirm in part and reverse in part.

Brother Gabriel Ward, aka Edward Ward, was employed by Our Lady of Victory Church from 1984 until June 1994 in a clerical position. Since 1979, Ward has belonged to a community of monks, known as The Brothers [*2] of Annunciation of Mary, and has worn a monk's habit as his regular clothing. Ward's community of brothers has sought, but has been unable to permanently obtain, official recognition or sponsorship from the Catholic Church. Because Ward was dressing as a monk and being addressed as "Brother" without the formal recognition of the Catholic Church, a practice that conflicted with church doctrine, Father

Hengle told Ward that he would have to cease the practice while at work. Ward explained to Father Hengle that this was a religious practice and he refused to comply. Ward's employment was terminated as a result.

Ward filed this action against the church, alleging that the church had violated state and federal law by discharging him on the basis of his religion. Both parties moved for summary judgment. The trial court denied both motions for summary judgment, concluding that there were triable issues of fact.

The case proceeded to trial. The jury found that the church had violated state and federal law by firing Ward based on his religion. Ward was awarded compensatory damages of $16,350 and punitive damages of $16,350. The trial court also awarded attorney fees to Ward. The church [*3] appeals and raises five assignments of error.

The first assignment of error is that the trial court erred in failing to grant the church's motion for summary judgment. In its motion for summary judgment, the church asserted: (1) that it was exempt from liability for religious discrimination; (2) that adjudication of this controversy violated the church's rights under the First Amendment; (3) that Ward had failed to establish a prima facie case of religious discrimination; and (4) that Ward had failed to exhaust his administrative remedies.

The church asserted that it was exempt from liability based on the following provision of Title VII of the Civil Rights Act of 1964:

> This title *[42 USCS §§ 2000e* et seq.] shall not apply *** to a religious corporation [or] association *** with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation [or] association *** of its activities.

Section 2000e-1, Title 42, U.S.Code. This exemption has been interpreted broadly to include essentially all types of religious discrimination by religious organizations. See, e.g., *Little v. Wuerl (C.A.3, 1991), 929[*4] F.2d 944, 950.*

In opposition to the church's motion for summary judgment, Ward did not dispute that this situation fell within the exemption. Instead, Ward argued (1) that there was a material issue of fact as to whether the church had waived the exemption through its conduct and (2) that the federal exemption did not apply to the Ohio religious discrimination statute, R.C. 4112.02. The trial court accepted Ward's waiver argument. Although we find that this was error, the error was harmless, because Ward's second argument was persuasive. The church was not exempt from Ward's discrimination claim under state law.

Ward's waiver argument was purely a factual one. He focused primarily on the church's "Personnel Practice Guidelines" handbook that stated that the church did not discriminate on the basis of religion when religion was not significant to the position. The trial court found that there was an issue of fact as to whether the church had waived it statutory exemption and allowed this issue to go to the jury.

Before the trial court addressed Ward's factual argument, however, it should have considered the threshold legal

issue of whether the statutory exemption can ever be [*5] waived through the defendant's conduct. As the church argued in its reply to Ward's opposition to summary judgment, Ward failed to support his waiver argument with any legal authority. Ward was likely unable to find, as was this court, any authority to support his position.

The more sustainable position is the one asserted by the church, that the Title VII exemption for religious organizations cannot be waived. See *Little v. Wuerl, 929 F.2d at 951.* Despite Ward's argument to the contrary, the exemption is not a right created by statute. The Title VII claimant has a statutorily-created right to pursue a religious discrimination claim against his employer. It is the claimant who has a right that can be waived through his conduct. See *Beadle v. Tampa (C.A. 11, 1995), 42 F.3d 633, 635.* The statutory exemption places a limitation on the claimant's right. It is not a privilege or interest subject to waiver. *Little, supra.* Ward's situa-tion fell within the exemption, so Title VII did not apply. Because, as a matter of law, the exemption could not be waived, the trial court should not have sent the waiver issue to the jury.

Although the trial court erroneously denied summary [*6] judgment on Ward's federal claim because the church was exempt from liability, the error was harmless. Ward had raised his discrimination claim under both state and federal law. He established through his second argument that his state discrimination claim remained viable.

Ward argued that he had a claim under state law because the federal exemption for religious organizations did not apply to the Ohio discrimination statute, R.C. 4112.02. Ward

contended that, even if the church was exempt from liability under Title VII, he still had a cause of action under state law.

R.C. 4112.02(A) provides:

It shall be an unlawful discriminatory practice:

For any employer, because of the *** religion *** of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Unlike the federal statute, R.C. Chapter 4112 includes no blanket exemption of religious organizations from liability for religious discrimination.

The church argued that, even though there is no exemption set forth in the statute, Ohio [*7] courts look to the law interpreting Title VII religious discrimination claims to interpret liability under R.C. 4112.02. See, e.g., *Little Forest Medical Ctr. of Akron v. Ohio Civ. Rights Comm. (1991), 61 Ohio St. 3d 607, 609, 575 N.E. 2d 1164.* The issue of whether the federal exemption applies to R.C. 4112.02, however, has never been addressed by a state court in Ohio. Although Ohio courts have generally looked to the law interpreting Title VII for guidance, this has always been in the context of whether there has been a violation of R.C. 4112.02.

Ward relied on a federal case, *Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm. (C.A. 6, 1985), 766*

F2d 932, which concluded that the federal exemption did not apply to R.C. 4112.02. The court based this conclusion on the fact that no such exemption is set forth in the Ohio Revised Code, while other exemptions for specific types of religious discrimination are. For example, R.C. 4112.02(K) exempts a religious organization from liability for discrimination in housing if it shows preference to a member of its own religion. R.C. 4112.02(E) exempts certain acts of employment discrimination, not relevant here, if based on a bona [*8] fide occupational qualification. The fact that the legislature did provide certain liability exemptions for religious organizations suggests that its failure to include a blanket exemption was by design and not inadvertence. We find this reasoning persuasive.

Moreover, although R.C. 4112.02 was enacted in 1959, prior to the 1964 enactment of Title VII and the exemption's 1972 amendment, it is fairly comprehensive and the legislature has amended it no less than thirteen times since its enactment. The legislature has demonstrated a clear intent that religious organizations fall within the operation of R.C. 4112.02, except as explicitly set forth in the statute. It is not the place of this court to rewrite the statute. Because the church was not exempt from liability under state law, the trial court properly denied summary judgment on the basis of the federal exemption.

The church's second argument in support of summary judgment was that the trial court denied its rights under the First Amendment. Specifically, it contends that adjudication of this controversy would require the court to examine the propriety of the church's position that Ward could not dress as a Franciscan monk because [*9] he did not have the formal

recognition of the church. Although it is true that the underlying dispute between Ward and the church was based on this Catholic doctrine, any inquiry into church doctrine ended there. All that was relevant to this dispute was that there was a conflict between the church's doctrine and Ward's religion and that this conflict led to Ward's termination from employment. There was no need to examine this doctrine any further or to pass upon its propriety. The church, therefore, failed to demonstrate that adjudication of this controversy would require the trial court to delve into church doctrine in violation of the First Amendment.

The church next argued that it was entitled to summary judgment because Ward had failed to establish a prima facie case of religious discrimination. On appeal, the church argues that the trial court erred in denying its motion for summary judgment on this basis. We cannot, however, address the propriety of the trial court denying the church's motion for summary judgment on the merits of Ward's claim. As the Ohio Supreme Court held in the syllabus of *Continental Ins. Co. v. Whittington (1994), 71 Ohio St. 3d 150, 642 N.E. 2d [*10] 615:*

> Any error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made.

We are precluded from reversing the denial of the church's for summary judgment on this issue of fact because it ultimately went to trial and was decided in Ward's favor.

The church's final argument in support of summary judgment was' that Ward failed to exhaust his administrative remedies. It asserted that, because Ward had remedies available to him through the Ohio Civil Rights Commission, he was required to exhaust those remedies before filing a civil action against the church. The church relied on case law, however, that predated the amendment to R.C. 4112.99. Effective September 28, 1987, R.C. 4112.99 has permitted a discrimination claimant to pursue an independent civil cause of action, without any requirement that he first exhaust his administrative remedies. See *Elek v. Huntington Natl. Bank (1991), 60 Ohio St. 3d 135, 136, 573 N.E. 2d 1056.* Because the church failed to [*11] demonstrate any grounds for summary judgment, the trial court did not err in denying its motion. The first assignment of error is overruled.

The church's second assignment of error is that the trial court erred in failing to grant its motion for directed verdict on the issue of whether it had waived the federal exemption through its conduct. As we explained in our discussion of the church's first assignment of error, because the church could not waive the exemption, the waiver issue should not have withstood the church's motion for summary judgment. As we also explained, however, Ward's claim remained viable under state law. The trial court did not err, therefore, in failing to direct a verdict in favor of the church. The second assignment of error is overruled.

As its third assignment of error, the church contends that the trial court erred in failing to direct a verdict in its favor because adjudication of this controversy violated its rights under the First Amendment. The church merely reiterates the First Amendment argument that it raised in its

motion for summary judgment. As we explained in our discussion of the church's first assignment of error, the argument is without merit. [*12] The third assignment of error is overruled accordingly.

The church's fourth assignment of error is that the trial court erred in failing to grant its motion for judgment notwithstanding the verdict. The church asserts on appeal that the trial court erred in rejecting the following grounds raised through its motion: (I) that the verdict was not supported by the evidence because the church presented ample evidence that accommodation of Ward's religious practice would cause it undue hardship; (2) that any award of compensatory damages in excess of $ 11,050 was not supported by the evidence; and (3) there was no evidence of any malice to support the award of punitive damages.

Each of these arguments is reviewed in light of the fact that a favorable ruling on a motion for judgment notwithstanding the verdict is not easily obtained. The evidence must be reviewed in a light most favorable to the non-moving party, and where there is substantial evidence to support his side of the case, upon which reasonable minds could reach different conclusions, the motion must be denied. *Posin v. A.B.C. Motor Court Hotel (1976), 45 Ohio St. 2d 271, 275, 344 N.E. 2d 334. The* church contends that [*13] the jury should have found that accommodating Ward's religious practice would cause undue hardship on the conduct of its business. The church asserted that it clearly proved such "undue hardship," thereby defeating Ward's discrimination claim.

After Ward established a prima facie claim of religious

discrimination (that he held a sincere religious belief that conflicted with a requirement of his employment, that he informed his employer of this conflict, and that he was discharged for failing to comply with this requirement), the burden shifted to the church to show either that it reasonably accommodated Ward or that it could not reasonably accommodate him without undue hardship. *South Wind Motel v. Civil Rights Comm. (1985), 24 Ohio App. 3d 209, 209-210, 494 N.E. 2d 1158; Cooper v. Oak Rubber Co. (C.A. 6, 1994), 15 E3d 1375, 1378.* Undue hardship need only be a de minimis cost to the employer. *Beadle v. Tampa, 42 F.3d at 635.*

The church argued in its motion, and argues again on appeal, that it had presented ample evidence of undue hardship. This contention, however, was not supported by any citation to the trial transcript. Our review of the record reveals that the jury [*14] reasonably rejected the church's argument that accommodating Ward's religious practice would cause undue hardship on its business. The church presented no evidence of any undue hardship. Ward did not deal with the public, but worked virtually by himself; no coworkers or parishioners ever complained about him wearing the habit to work; the priest and other church representatives testified that Ward's practice of wearing the habit did not interfere with his work, the church's business, or the parishioners' worship in any way. As the jury's rejection of the church's undue hardship defense was supported by competent, credible evidence, it was not against the manifest weight of the evidence. See *C.E. Morris Co. v. Foley Constr. Co. (1978), 54 Ohio St. 2d 279, 376 N.E. 2d 578,* syllabus.

The church next challenges the award of compensatory

damages.

The jury awarded Ward $16,350 in compensatory damages ($ 11,050 for lost wages and $ 5,300 for "compensatory damages or losses in addition to his salary. Ward presented undisputed evidence, and the jury was so instructed, that he suffered lost wages of $ 11,050, his annual salary at the time.

The church contends that there was no [*15] evidence to support the award of $ 5,300, because Ward incurred no additional losses. Ward argues that he presented evidence that, due to his termination, he incurred a health insurance expense and he sustained pain and suffering. Ward did present evidence that he had lost his health care coverage, and as a result, was paying premiums of $ 600 per quarter ($ 2,400 for the year). The record is devoid, however, of any evidence of any pain and suffering by Ward. At best, he said that when he lost his job, he was "shocked." This was the only reference to Ward's emotional state. He did not follow that up with any evidence that he suffered any emotional impact, inconvenience, or any other type of non-monetary suffering whatsoever. There was no evidence from which the jury could even infer that Ward experienced any pain or suffering. Given the total lack of evidence to support $ 2,900 of the compensatory damages awarded, that portion of the award was not warranted.

The church finally contends that the award of punitive damages was unsupported by any evidence. The parties agree, and the jury was instructed, that punitive damages could be awarded in this case upon a showing of actual malice. [*16] See, e.g., *Potocnik v. Sifco Industries, Inc. (1995), 103 Ohio App. 3d 560, 574, 660 N.E. 2d 510.* Actual malice requires

proof either that the defendant's conduct (1) was characterized by hatred, ill will, or a spirit of revenge; or (2) demonstrated a conscious disregard for the rights and safety of other persons that has a great probability of substantial harm. *Preston v. Murty (1987), 32 Ohio St. 3d 334, 512 N.E. 2d 1174,* syllabus. Punitive damages are intended to deter conduct resulting from a mental state that is "so callous in its disregard for the rights and safety of others that society deems it intolerable." *Calmes v. Goodyear Tire Co. (1991), 61 Ohio St. 3d 470, 473, 575 N.E. 2d 416.*

The church contends that punitive damages were not warranted because Ward presented no evidence of malice. Our review of the record supports this contention.

Ward failed to present any evidence from which the jury could infer that Father Hengle or any other representative of the church acted with hatred, ill will, a spirit of revenge or with reckless indifference toward Ward's rights. He merely presented evidence that, at best, established that Father Hengle and the church committed [*17] one act of religious discrimination and nothing more egregious than that. All the evidence tends to demonstrate that the allegedly discriminatory action of the church and Father Hengle was solely motivated by their own religious beliefs, not a spirit of revenge or ill will of any sort. There was absolutely no evidence of any bad blood between Hengle and Ward or any prior acts of discrimination. As the jury had no basis upon which to award punitive damages, that portion of the church's assignment of error has merit. The fourth assignment of error is overruled in part and sustained as it relates to the award of punitive damages and $ 2,900 of the compensatory damage award.

The church's fifth assignment of error is that the trial court erred in its selection of the jury by systematically excluding members of the Roman Catholic faith from the venire. The church raises this challenge for the first time on appeal. A fundamental rule of appellate review is that a reviewing court will not consider as error any issue that a party was aware of but failed to bring to the trial court's attention at a time that it could have been remedied. *Little Forest Medical Ctr. of Akron v. Ohio Civ. Rights [*18] Comm. (1993), 91 Ohio App. 3d 76, 80, 631 N.E. 2d 1068; State v. Williams (1977), 51 Ohio St. 2d 112, 364 N.E. 2d 1364,* paragraph two of the syllabus. Because the church did not raise this issue below, we will not consider it now. The fifth assignment of error is overruled.

Judgment affirmed in part,

reversed in part, and the cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of. judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed equally to both parties.

Exceptions.

LYNN C. SLABY

FOR THE COURT

QUILLIN, P. J.

BAIRD, J.

CONCUR

APPENDIX C

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

Filed January 2, 1998

STATE OF OHIO	)	
	) SS:	
COUNTY OF SUMMIT	)	
BROTHER GABRIEL WARD	)	C.A. NO. 18234
Appellee	)	
	)	
v.	)	
	)	
FATHER JOHN HENGLE, et al.	)	
Appellants	)	JOURNAL ENTRY

This cause is heard upon appellant's motion to reconsider the decision and journal entry filed in this case on December 10, 1997. Appellee responded in opposition to the motion.

Appellant contends that this Court should have addressed the propriety of the trial court's award of attorney fees, an issue that appellant failed to assign as error or otherwise address in its appellate brief. Moreover, appellant did not challenge the award of attorney fees in the trial court, and, therefore, failed to preserve the issue for appellate review.

Because appellant's motion fails to call to this Court's attention an obvious error in the decision or raise an issue that was not fully considered by this Court when it should have been, the motion for reconsideration is denied. See *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143.

/s/_____
Lynn Slaby, Judge

/s/_____
Daniel Quillin, Judge

/s/_____
William Baird, Judge

cc: Orville L. Reed, III, and Steven R. Malynn, Attorneys at Law, 50 South Main Street, P. O. Box 1500, Akron, Ohio 44309.

Richard E. Dobbins and Nicholas Swyrydenko, Attorneys at Law, Ridgewood Centre, Suite 105, 1000 S. Cleveland-Massillon Road, Akron, Ohio 44333.

APPENDIX D

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

Filed Jan. 30, 1998

STATE OF OHIO	)	
	) SS:	
COUNTY OF SUMMIT	)	
BROTHER GABRIEL WARD	)	C.A. NO. 18234
Appellee	)	
	)	
v.	)	
	)	
FATHER JOHN HENGLE, et al.	)	
Appellants	)	JOURNAL ENTRY

This cause came to be heard upon appellee's motion for reconsideration.

The motion is denied.

/s/_____
Daniel B. Quillin
Presiding Judge

/s/_____
William R. Baird
Judge

/s/_____
Lynn C. Slaby
Judge

cc: Richard E. Dobbins and Nicholas Swyrydenko, Attorneys at Law, Ridgewood Centre, Suite 105, 1000 S. Cleveland-Massillon Rd., Akron, OH 44333.

Orville L. Reed, Attorney at Law, 50 S. Main St., P.O. Box 1500, Akron, OH 44309.

APPENDIX E

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

Filed November 13, 1996

BROTHER GABRIEL WARD Plaintiff,	) C.A. NO. 18234) JUDGE CALLAHAN
v.	)
FATHER JOHN HENGLE, et al. Defendants	)) JUDGMENT ENTRY

This cause came before the Court upon Defendant's Motion for Judgment Notwithstanding the Verdict. Upon due consideration, this Court finds the Defendant's motion to be not well taken. Accordingly, the motion is hereby Denied.

IT IS SO ORDERED.

/s/_____
JUDGE MICHAEL T. CALLAHAN

cc Att. Orville L. Reed, III
Att. Richard E. Dobbins
Att. Nicholas Swyrydenko

APPENDIX F

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

Filed August 29, 1996

BROTHER GABRIEL WARD Plaintiff	) CASE NO.) CV 94 10 3522) JUDGE MICHAEL
v.	) T. CALLAHAN)
FATHER JOHN HENGLE, et al. Defendants	) JUDGMENT ENTRY)

This cause came on to be heard on the pleadings and upon the issues joined, in a Trial had upon the evidence presented, and a jury having been duly empaneled did on April 15, 1996, render a verdict in favor of the Plaintiff, BROTHER GABRIEL M. WARD, in the amount of $16,350.00 as compensatory damages and did render a verdict in the favor of the Plaintiff, BROTHER GABRIEL M. WARD, in the amount of $16,350.00 as punitive damages, and the Court having determined reasonable attorneys' fees in the amount of $53,310.00;

IT IS THEREFORE ORDERED BY THE COURT that judgment be, and the same hereby is rendered against the Defendants, FATHER JOHN HENGLE, et al., and in favor of the Plaintiff, BROTHER GABRIEL

WARD, in the amount of $86,010.00, together with the costs of this action.

/s/_____
JUDGE MICHAEL T. CALLAHAN

APPROVED:

/s/_____
RICHARD E. DOBBINS (0001118)
Attorney for Plaintiff

/s/_____
ORVILLE L. REED III (0023522)
Attorney for Defendants

APPENDIX G

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

Filed August 18, 1995

BROTHER GABRIEL WARD Plaintiff	) CASE NO.) CV 94 10 3522) JUDGE
v.	) CALLAHAN)
FATHER JOHN HENGLE, et al. Defendants	) **ORDER**)

This matter is before the Court on parties' cross Motions for Summary Judgment responses and replies thereto.

Upon due consideration, the Court finds that there are genuine issues of material triable fact. Accordingly, the Court does not find either parties' Motion well taken, and both are

DENIED.

It is so ordered.

cc: Attorney Richard E. Dobbins
Attorney Nicholas Swyrydenko
Attorney Orville L. Reed, III
Attorney Christopher S. Humphrey

dle
94-3522

APPENDIX H

*59 ORC US CONST AM I

BALDWIN'S OHIO REVISED CODE ANNOTATED
THE CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AM I

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

RELATED TERMS

ASSEMBLY; BILL OF RIGHTS; CIVIL RIGHTS; FREEDOM; PEACEABLE ASSEMBLY; PEOPLE; PETITIONS; PRESS, FREEDOM OF; REDRESS OF GRIEVANCES; RELIGION; RIGHTS; SPEECH, FREEDOM OF

HISTORY: Proposed 1789, Adopted 1791

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APPENDIX I

US CONST AM XIV

*73 ORC US CONST AM XIV

BALDWIN'S OHIO REVISED CODE
ANNOTATED
THE CONSTITUTION OF THE UNITED
STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AM XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RELATED TERMS

CITIZENSHIP; CONGRESS, UNITED STATES; DISCRIMINATION; DUE PROCESS; IMMIGRATION AND NATURALIZATION; LIFE; PRIVILEGES AND IMMUNITIES; STATE; UNITED STATES; VOTERS AND VOTING

AMENDMENT XIV - UNITED STATES CONSTITUTION

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

RELATED TERMS

CONGRESS, UNITED STATES; ELECTIONS; LIFE; VOTERS AND VOTING

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But

Congress may by a vote of two-thirds of each house, remove such disability.

*74 RELATED TERMS

CONGRESS, UNITED STATES; INSURRECTIONS; LIFE; PUBLIC OFFICIALS; VOTERS AND VOTING

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

RELATED TERMS

CONGRESS, UNITED STATES; DEBTS, PUBLIC; INSURRECTIONS; LIFE; VOTERS AND VOTING

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

RELATED TERMS
CONGRESS, UNITED STATES; LIFE; VOTERS AND VOTING

APPENDIX J

BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XLI. LABOR AND INDUSTRY
CHAPTER 4112. CIVIL RIGHTS COMMISSION
GENERAL PROVISIONS

Current through 1997 Portion of 122nd G.A., Files 1 to 112, apv. 1/9/98

4112.01 DEFINITIONS

(A) As used in this chapter:

(1) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. "Person" also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesman, appraiser, agent, employee, lending institution, and the state and all political subdivisions, authorities, agencies, boards, and commissions of the state.

(2) "Employer" includes the state, any political subdivision of the state, any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer.

(3) "Employee" means an individual employed by any

employer but does not include any individual employed in the domestic service of any person.

(4) "Labor organization" includes any organization that exists, in whole or in part, for the purpose of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or other mutual aid or protection in relation to employment.

(5) "Employment agency" includes any person regularly undertaking, with or without compensation, to procure opportunities to work or to procure, recruit, refer, or place employees.

(6) "Commission" means the Ohio civil rights commission created by section 4112.03 of the Revised Code.

(7) "Discriminate" includes segregate or separate.

(8) "Unlawful discriminatory practice" means any act prohibited by section 4112.02, 4112.021, or 4112.022 of the Revised Code.

(9) "Place of public accommodation" means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public.

(10) "Housing accommodations" includes any building or structure, or portion of a building or structure, that is used or occupied or is intended, arranged, or designed to be used or

occupied as the home residence, dwelling, dwelling unit, or sleeping place of one or more individuals, groups, or families whether or not living independently of each other; and any vacant land offered for sale or lease. "Housing accommodations" also includes any housing accommodations held or offered for sale or rent by a real estate broker, salesman, or agent, by any other person pursuant to authorization of the owner, by the owner, or by the owner's legal representative.

*58983 (11) "Restrictive covenant" means any specification limiting the transfer, rental, lease, or other use of any housing accommodations because of race, color, religion, sex, familial status, national origin, handicap, or ancestry, or any limitation based upon affiliation with or approval by any person, directly or indirectly, employing race, color, religion, sex, familial status, national origin, handicap, or ancestry as a condition of affiliation or approval.

(12) "Burial lot" means any lot for the burial of deceased persons within any public burial ground or cemetery, including, but not limited to, cemeteries owned and operated by municipal corporations, townships, or companies or associations incorporated for cemetery purposes.

(13) "Handicap" means a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

(14) Except as otherwise provided in section 4112.021 of the Revised Code, "age" means at least forty years old.

(15) "Familial status" means either of the following:

(a) One or more individuals who are under eighteen years of age and ho are domiciled with a parent or guardian having legal custody of the individual or domiciled, with the written permission of the parent or guardian having legal custody, with a designee of the parent or guardian;

(b) Any person who is pregnant or in the process of securing legal custody of any individual who is under eighteen years of age.

(16)(a) Except as provided in division (A)(16)(b) of this section, "physical or mental impairment" includes any of the following:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine;

(ii) Any mental or psychological disorder, including, but not limited to, mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(iii) Diseases and conditions, including, but not limited to, orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, human immunodeficiency virus infection, mental retardation, emotional illness, drug addiction, and alcoholism.

(b) "Physical or mental impairment" does not include any of the following:

*58984 (ii) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(iii) Compulsive gambling, kleptomania, or pyromania;

(iv) Psychoactive substance use disorders resulting from current illegal use of a controlled substance.

(17) "Dwelling unit" means a single unit of residence for a family of one or more persons.

(18) "Common use areas" means rooms, spaces, or elements inside or outside a building that are made available for the use of residents of the building or their guests, and includes, but is not limited to, hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas, and passageways among and between buildings.

(19) "Public use areas" means interior or exterior rooms or spaces of a privately or publicly owned building that are made available to the general public.

(20) "Controlled substance" has the same meaning as in section 3719.01 of the Revised Code.

(21) "Handicapped person" means a person with a handicap.

(22) "Handicapped tenant" means a tenant or prospective tenant who is a handicapped person.

(B) For the purposes of divisions (A) to (F) of section 4112.02 of the Revised Code, the terms "because of sex" and "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions. Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in division (B) of section 4111.17 of the Revised Code shall be interpreted to permit otherwise. This division shall not be construed to require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or except where medical complications have arisen from the abortion, provided that nothing in this division precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

OH ST § 4112.01, DEFINITIONS

RELATED TERMS

CIVIL RIGHTS; COVENANTS; DEFINITIONS; DISCRIMINATION; FAMILIAL STATUS; REAL PROPERTY ***58985**

CREDIT(S)

(1992 H 321, EFF. 6-30-92; 1990 H 314; 1979 H 19, H 230; 1976 S 162; 1973 H 610; 1969 H 432, H 47; 131 v S 189;

< General Materials (GM) - References, Annotations, or Tables >

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LAW REVIEW AND JOURNAL COMMENTARIES

Ohio Handicap Discrimination Laws Amended. 1 Employment Prac L Monthly 45 (August 1992)

APPENDIX K

***59001 R.C. § 4112.02**

BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XLI.LABOR AND INDUSTRY
CHAPTER 4112. CIVIL RIGHTS COMMISSION
GENERAL PROVISIONS

Current through 1997 Portion of 122nd G.A., Files 1 to 112, apv. 1/9/98

4112.02 UNLAWFUL DISCRIMINATORY PRACTICES

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, national origin, handicap, age, or ancestry, to do any of the following:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate

against any person;

(2) comply with a request from an employer for referral of applicants for employment if the request directly or indirectly indicates that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to do any of the following:

(1) Limit or classify its membership on the basis of race, color, religion, sex, national origin, handicap, age, or ancestry;

(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, national origin, handicap, age, or ancestry.

(D) for any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, national origin, handicap, age, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, personnel placement service, or labor organization, prior to

employment or admission to membership, to do any of the following:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, handicap, age, or ancestry of an applicant for employment or membership;

*59002 (2) Make or keep a record of the race, color, religion, sex, national origin, handicap, age, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank, seeking to elicit information regarding race, color, religion, sex, national origin, handicap, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency of that government, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain that proof in the employer's personnel records and may use photographic or fingerprint identification for security purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, national origin, handicap, age, or ancestry;

(5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or

membership opportunities of any group because of the race, color, religion, sex, national origin, handicap, age, or ancestry of that group;

(6) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service, training school or center, labor organization, or to any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, national origin, handicap, age, or ancestry.

(F) For any person seeking employment to publish or cause to be published any advertisement that specifies or in any manner indicates that person's race, color, religion, sex, national origin, handicap, age, or ancestry of any prospective employer.

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, handicap, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

(H) For any person to do any of the following:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, familial status, ancestry,

handicap, or national origin;

*59003 (2) Represent to any person that housing accommodations are not available for inspection, sale, or rental, when in fact they are available, because of race, color, religion, sex, familial status, ancestry, handicap, or national origin;

(3) discriminate against any person in the making or purchasing of loans or the provision of other financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, or any person in the making or purchasing of loans or the provision of other financial assistance that is secured by residential real estate, because of race, color, religion, sex, familial status, ancestry, handicap, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located, provided that the person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to the person's principal business and not only as a part of the purchase price of an owner-occupied residence the person is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, because of race, color,

religion, sex, familial status, ancestry, handicap, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations because of race, color, religion, sex, familial status, ancestry, handicap, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member of a married couple;

(7) Print, publish, or circulate any statement or advertisement, or make or cause to be made any statement or advertisement, relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing accommodations, or relating to the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of any housing accommodations that indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, familial status, ancestry, handicap, or national origin, or an intention to make any such preference, limitation, specification, or discrimination;

*59004 (8) Except as otherwise provided in division (H)(8) or (17) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, familial status, ancestry, handicap, or national origin for the purpose of monitoring compliance with this chapter.

(9) Include in any transfer, rental, or lease of housing accommodations any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant;

(10) Induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, familial status, or ethnic composition of the block, neighborhood, or other area in which the housing accommodations are located, or induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that the presence or anticipated presence of persons of any race, color, religion, sex, familial status, ancestry, handicap, or national origin, in the block, neighborhood, or other area will or may have results including, but not limited to, the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, familial status, or ethnic composition of the block, neighborhood, or other area;

(c) An increase in criminal or antisocial behavior in the block, neighborhood, or other area;

(d) A decline in the quality of the schools serving the block, neighborhood, or other area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or discriminate against any person in the terms or conditions of that access, membership, or participation, on account of race, color, religion, sex, familial status, national origin, handicap or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (H) of this section;

(13) Discourage or attempt to discourage the purchase by a prospective purchaser of housing accommodations, by representing that any block, neighborhood, or other area has undergone or might undergo a change with respect to its religious, racial, sexual, familial status, or ethnic composition;

(14) Refuse to sell, transfer, assign, rent, lease, sublease, or finance, or otherwise deny or withhold, a burial lot from any person because of the race, color, sex, familial status, age, ancestry, handicap, or national origin of any

prospective owner or user of the lot;

*59005 (15) Discriminate in the sale or rental of, or otherwise make unavailable or deny, housing accommodations to any buyer or renter because of a handicap of any of the following:

(a) The buyer or renter;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(15)(b) of this section.

(16) Discriminate in the terms, conditions, or privileges of the sale or rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of a handicap of any of the following:

(a) That person;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(16)(b) of this section.

(17) Except as otherwise provided in division (H)(17) of this section, make an inquiry to determine whether an applicant for the sale or rental of housing accommodations, a person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available, or any individual associated with that person has a handicap, or make an inquiry to determine the nature or severity of a handicap of the applicant or such a person or individual. The following inquiries may be made of all applicants for the sale or rental of housing accommodations, regardless of whether they have handicaps;

(a) An inquiry into an applicant's ability to meet the requirements of ownership or tenancy;

(b) An inquiry to determine whether an applicant is qualified for housing accommodations available only to persons with handicaps or persons with a particular type of handicap;

(c) An inquiry to determine whether an applicant is qualified for a priority available to persons with handicaps or persons with a particular type of handicap;

(d) An inquiry to determine whether an applicant currently uses a controlled substance in violation of section 2925.11 of the Revised Code or a substantively comparable municipal ordinance;

(e) An inquiry to determine whether an applicant at any time has been convicted of or pleaded guilty to any offense, an element of which is the illegal sale, offer to sell,

cultivation, manufacture, other production, shipment, transportation, delivery, or other distribution of a controlled substance.

***59006** (18)(a) Refuse to permit, at the expense of a handicapped person, reasonable modifications of existing housing accommodations that are occupied or to be occupied by the handicapped person, if the modifications may be necessary to afford the handicapped person full enjoyment of the housing accommodations. This division does not preclude a landlord of housing accommodations that are rented or to be rented to a handicapped tenant from conditioning permission for a proposed modification upon the handicapped tenant's doing one or more of the following:

(i) Provide a reasonable description of the proposed modification and reasonable assurances that the proposed modification will be made in a workmanlike manner and that any required building permits will be obtained prior to the commencement of the proposed modification;

(ii) Agreeing to restore at the end of the tenancy the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if it is reasonable for the landlord to condition permission for the proposed modification upon the agreement;

(iii) Paying into an interest-bearing escrow account that is in the landlord's name, over a reasonable period of time, a reasonable amount of money not to exceed the projected costs at the end of the tenancy of the restoration of

the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if the landlord finds the account reasonably necessary to ensure the availability of funds for the restoration work. The interest earned in connection with an escrow account described in this division shall accrue to the benefit of the handicapped tenant who makes payments into the account.

(b) A landlord shall not condition permission for a proposed modification upon a handicapped tenant's payment of a security deposit that exceeds the customarily required security deposit of all tenants of the particular housing accommodations.

(19) Refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including associated public and common use areas;

(20) Fail to comply with the standards and rules adopted under division (A) of section 3781.111 of the Revised Code;

(21) Discriminate against any person in the selling, brokering, or appraising of real property because of race, color, religion, sex, familial status, ancestry, handicap, or national origin;

(22) Fail to design and construct covered multifamily dwellings for first occupancy on or after June 30,

1992 in accordance with the following conditions:

(a) The dwellings shall have at least one building entrance on an accessible route, unless it is impractical to do so because of the terrain or unusual characteristics of the site.

*59007 (b) With respect to dwellings that have a building entrance on an accessible route, all of the following apply:

(i) The public use areas and common use areas of the dwellings shall be readily accessible to and usable by handicapped persons.

(ii) All the doors designed to allow passage into and within all premises shall be sufficiently wide to allow passage by handicapped persons in wheelchairs.

(iii) All premises within covered multifamily dwelling units shall contain an accessible route into and through the dwelling; all light switches, electrical outlets, thermostats, and other environmental controls within such units shall be in accessible locations; the bathroom walls within such units shall contain reinforcements to allow later installation of grab bars; and the kitchens and bathrooms within such units shall be designed and constructed in a manner that enables an individual in a wheelchair to maneuver about such rooms.

For purposes of division (H)(22) of this section, "covered multifamily dwellings" means buildings consisting of four or more units if such buildings have one or more

elevators and ground floor units in other buildings consisting of four or more units.

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

(J) For any person to aid, abet bet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K)(1) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any nonprofit charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization, from limiting the sale, renal, or occupancy of housing accommodations that it owns or operated for other than a commercial purpose to persons of the same religion, or from giving preference in the sale, rental, or occupancy of such housing accommodations to persons of the same religion, unless membership in the religion is restricted on account of race, color, or national origin.

*59008 (2) Nothing in division (H) of this section shall bar any bona fide private or fraternal organization that, incidental to its primary purpose, owns or operates lodging for other than a commercial purpose, from limiting the rental or occupancy of the lodgings to its members or from giving preference to its members.

(3) Nothing in division (H) of this section limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations. Nothing in that division prohibits the owners or managers of housing accommodations from implementing reasonable occupancy standards based on the number and size of sleeping areas or bedrooms and the overall size of a dwelling unit, provided that the standards are not implemented to circumvent the purposes of this chapter and are formulated, implemented, and interpreted in a manner consistent with this chapter and any applicable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations.

(4) Nothing in division (H) of this section requires that housing accommodations be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(5) Nothing in division (H) of this section pertaining to discrimination on the basis of familial status shall be construed to apply to any of the following:

OH ST § 4112.02
UNLAWFUL DISCRIMATORY PRACTICES

(a) Housing accommodations provided under any state or federal program that have been determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended to be specifically designed and operated to assist elderly persons;

(b) Housing accommodations intended for and solely occupied by persons who are sixty-two years of age or older;

(c) Housing accommodations intended and operated for occupancy by at least one person who is fifty-five years of age or older per unit, as determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended.

(L) Nothing in divisions (A) to (E) of this section shall be construed to require a handicapped person to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the handicapped person, other employees, the general public, or the facilities in which the work is to be performed, or to require the employment or training of a handicapped person in a job that requires the handicapped person routinely to undertake any tasks, the performance of which is substantially and inherently impaired by the handicapped person's handicap.

***59009** (M) Nothing in divisions (H)(1) to (18) of this section shall be construed to require any person selling or renting property to modify the property in any way or to exercise a higher degree of care for a person having a

handicap, to relieve any handicapped person of any obligation generally imposed on all persons regardless of handicap in a written lease, rental agreement, or contract of purchase or sale, or to forbid distinctions based on the inability to fulfill the terms and conditions, including financial obligations, of the lease, agreement, or contract.

(N) An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within two years after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights.

A person who files a civil action under this division is barred, with respect to the practices complained of, from instituting a civil action under section 4112.14 of the Revised Code and from filing a charge with the commission under section 4112.05 of the Revised Code.

(O) With regard to age, it shall not be an unlawful discriminatory practice and it shall not constitute a violation of division (A) of section 4112.14 of the Revised Code for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation that may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, including, but not limited to, a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of this section. However, no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual, because of the individual's age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 623, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 623, as amended.

(3) Retire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, of the employer of the employee, which equals, in the aggregate, at least forty-four thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 631, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 631, as amended;

***59010** (4) Observe the terms of any bona fide apprenticeship program if the program is registered with the Ohio apprenticeship council pursuant to sections 4111.25 to 4111.30 of the Revised Code and is approved by the federal

committee on apprenticeship of the United States department of labor.

(P) Nothing in this chapter prohibiting age discrimination and nothing in division (A) of section 4112.14 of the Revised Code shall be construed to prohibit the following:

(1) The designation of uniform age the attainment of which is necessary for public employees to receive pension or other retirement benefits pursuant to Chapter 145., 742., 3307., 3309., or 5505. of the Revised Code;

(2) The mandatory retirement of uniformed patrol officers of the state highway patrol as provided in section 5505.16 of the Revised Code;

(3) the maximum age requirements for appointment as a patrol officer in the state highway patrol established by section 5503.01 of the Revised Code;

(4) The maximum age requirements established for original appointment to a police department or fire department in sections 124.41 and 124.42 of the Revised Code;

(5) Any maximum age not in conflict with federal law that may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustees for original appointment as a police officer or fire fighter;

(6) Any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal

ordinance, or resolution of a board of township trustees pertaining to police officers and fire fighters;

(7) Until January 1, 1994, the mandatory retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure, at an institution of higher education as defined in the "Education Amendments of 1980," 94 Stat. 1503, 20 U.S.C.A. 1141(a).

(Q)(1)(a) Except as provided in division (Q)(1)(b) of this section, for purposes of divisions (A) to (E) of this section, a handicap does not include any physiological disorder or condition, mental or psychological disorder, or disease or condition caused by an illegal use of any controlled substance by an employee, applicant, or other person, if an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee acts on the basis of that illegal use.

(b) Division (Q)(1)(a) of this section does not apply to an employee, applicant, or other person who satisfies any of the following:

*59011 (i) The employee, applicant, or other person has successfully completed a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance, or the employee, applicant, or other person otherwise successfully has been rehabilitated and no longer is engaging in that illegal use.

(ii) The employee, applicant, or other person is

participating in a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance.

(iii) The employee, applicant, or other person is erroneously regarded as engaging in the illegal use of any controlled substance, but the employee, applicant, or other person is not engaging in that illegal use.

(2) Divisions (A) to (E) of this section do not prohibit an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee from doing any of the following:

(a) Adopting or administering reasonable policies or procedures, including, but not limited to, testing for the illegal use of any controlled substance, that are designed to ensure that an individual described in division (Q)(1)(b)(i) or (ii) of this section no longer is engaging in the illegal use of any controlled substance;

(b) Prohibiting the illegal use of controlled substances and the use of alcohol at the workplace by all employees;

(c) Requiring that employees not be under the influence of alcohol or not be engaged in the illegal use of any controlled substance at the workplace;

(d) Requiring that employees behave in conformance with the requirements established under "The Drug-Free Workplace Act of 1988," 102 Stat 4304, 41

U.S.C.A. 701, as amended;

(e) Holding an employee who engages in the illegal use of any controlled substance or who is an alcoholic to the same qualification standards for employment or job performance, and the same behavior, to which the employer, employment agency, personnel placement service, labor organization, or joint labor-management committee holds other employees, even if any unsatisfactory performance or behavior is related to an employee's illegal use of a controlled substance or alcoholism;

(f) Exercising other authority recognized in the "Americans with Disabilities Act of 1990," 104 Stat. 327, 42 U.S.C.A. 12101, as amended, including, but not limited to, requiring employees to comply with any applicable federal standards.

(3) For purposes of this chapter, a test to determine the illegal use of any controlled substance does not include a medical examination.

(4) Division (Q) of this section does not encourage, prohibit, or authorize, and shall not be construed as encouraging, prohibiting, or authorizing, the conduct of testing for the illegal use of any controlled substance by employees, applicants, or other persons, or the making of employment decisions based on the results of that type of testing.
*59012

RELATED TERMS

OH ST § 4112.02
UNLAWFUL DISCRIMATORY PRACTICES

ADVERTISING; AIDING AND ABETTING; APPRENTICES; BANKS AND BANKING; BLACKS; BLOCK BUSTING; CIVIL RIGHTS; COVENANTS; DISCRIMINATION; DRUG OFFENSES; DRUGS; DRUG TREATMENT PROGRAMS; EMPLOYER AND EMPLOYEE; EMPLOYMENT AGENCIES; FAMILIAL STATUS; FEMALES; FINGERPRINTS; FRATERNAL ORGANIZATIONS; HANDICAPPED PERSONS; HARASSMENT; HOTELS; HOUSING DISCRIMINATION; HUSBAND AND WIFE; LABOR UNIONS; LANDLORD AND TENANT; LOANS; MORTGAGES; PHOTOGRAPHS; RACIAL DISCRIMINATION; REAL ESTATE BROKERS AND SALESPERSONS; REAL PROPERTY; REDLINING; RELIGION; RELIGIOUS ORGANIZATIONS; SEX DISCRIMINATION; SEXUAL HARASSMENT

CREDIT(S)

(1996 H 350, eff. 1-27-97; 1995 S 2, eff. 7-1-96; 1995 S 162, eff. 10-29-95; 1992 H 321, § 1, eff. 6-30-92; 1992 H 321, § 3; 1990 H 314, § 1, 3; 1987 H 5; 1980 S 367; 1979 H 230; 1976 S 162; 1975 H 151; 1973 H 610; 1969 H 432, H 47; 131 v S 189; 129 v 1694; 128 v 12)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Ed. Note: The amendment of this section by 1990 H 314, § 3, eff. 1-1-94, was rescinded by 1992 H 321, § 3, eff. 6-30-92. See Baldwin's Ohio Legislative Service, 1990 Laws of Ohio, page 5-57, and 1992 Laws of Ohio, page ...

APPENDIX L

***59520 R.C. § 4112.99**

BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XLI. LABOR AND INDUSTRY
CHAPTER 4112. CIVIL RIGHTS COMMISSION
CIVIL ACTION FOR VIOLATIONS

Current through 1997 Portion of 122nd G.A., Files 1 to 112, apv. 1/9/98

4112.99 CIVIL ACTION FOR VIOLATIONS

Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief. A civil action commenced pursuant to this section shall be brought within two years after the alleged unlawful discriminatory practice occurred. The period of limitation specified in this section for purposes of a civil action authorized by this section does not affect any other period of limitation that is specified in another section of this chapter for purposes of a distinct civil action authorized by that other section, including, but not limited to, a civil action authorized by division (N) of section 4112.02, division (D) of section 4112.021, division (A) of section 4112.051, or division (B) of section 4112.14 of the Revised Code.

RELATED TERMS

CIVIL RIGHTS; CIVIL RIGHTS COMMISSION; DAMAGES; DISCRIMINATION; HOUSING

OH ST § 4112.99, CIVIL ACTION FOR VIOLATIONS

DISCRIMINATION; INJUNCTIVE RELIEF; LIMITATION OF ACTIONS

CREDIT(S)

(1996 H 350, eff. 1-27-97; 1987 H 5, eff. 9-28-87; 1976 S 162; 1969 H 432; 128 v 12)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Amendment Note; 1996 H 350 added the second and third sentences.

REFERENCES

OHIO ADMINISTRATIVE CODE REFERENCES

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LIBRARY REFERENCES

Ojur 3d: 14, Civil Rights § 26
Am Jur 2d: 15, Civil Rights § 64
Damages and other relief under state legislation forbidding job discrimination on account of handicap.
78 ALR4th 435
Judicial construction and application of state legislation prohibiting religious discrimination in employment.

OH ST § 4112.99, CIVIL ACTION FOR VIOLATIONS

37 ALR5th 349

*59521

Baldwin's Ohio School Law, Text 17.04(B)(C)

Hausser, Ohio Real Estate Law and Practice (2d Ed.), Text 63.31

Siegel & Stephen, Ohio Employment Practices Law (2d Ed.), Text 3.02, 3.03 (B), 17.03, 17.05(A), 20.02(E)(F), 20.05(A), 21.05(A), 21.06(B)(C)

LAW REVIEW AND JOURNAL COMMENTARIES

Courts Shorten R.C. **4112.99** Statute of Limitations, 1 Employment Prac L Monthly 38 (June 1992).

Discrimination: Expanded Rights for Plaintiffs under State and Federal Law, Bradd R. Siegel and John M. Stephen. 1 Employment Prac L Monthly 1 (January 1992).

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Sexual Harassment: Telling the Other Victims' Story, Michael S. Greve. (Ed. note: The denial of basic procedural safeguards to accused individuals is discussed.) 23 N Ky L Rev 523 (1996).

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freedom of speech by anti-harassment laws is discussed.) 47 Rutgers L Rev 579 (1995)

APPENDIX M

EQUAL EMPLOYMENT OPPORTUNITIES

42 §2000e-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because

of his race, color, religion. sex. or national origin, or to classify' or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin:

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management

committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify)' or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal opera. tion of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation,

association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Commu-hist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee. or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Commu-nist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position,

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of

such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race. color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is

authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organiza. tion, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A)An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race. color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party, can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business

necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the

basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Consti. rution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had–

(I) actual notice of the proposed judgment or

order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present Objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to--

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment

or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment Or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

(Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109; Pub.L. 102-166, title I, §§ 105(a), 106, 107(a), 108, Nov. 21, 1991, 105 Stat. 1074-1076.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1964 Acts. Senate Report No. 872 and Hose Report No. 914, see 1964 U.S. Code cong. and Adm. News, p. 2355.

1972 Acts. House Report No. 92-238 and Conference Report No. 92-899, see 1972 U.S. Code Cong. and Adm. News, p. 2137.

1991 Acts. House Report No. 102-40 (Parts I and II),

Interpretative Memorandum, and Statement by President, see 1991 U.S. Code cong. and Adm. News, p. 549

References in Text

The Subversive Activities Control Act of 1950, referred to in subsec. (f), is Act Sept. 23, 1950, c. 1024, Title I, 64 Stat. 987, which is classified principally to sub-chapter I (section 781 et seq.) of chapter 23 of Title 50, War and National Defense. For complete classification of this Act to the Code, see Short Title note set out under section 781 of Title 50 and Tables.

The Controlled Substances Act, referred to in subsec. (k)(3), is Title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (section 801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

The Federal Rules of Civil Procedure, referred to in subsec. (n)(2)(A), are set out in Title 28, Judiciary and Judicial Procedure.

Amendments

1991 Amendments Subsec. (k) Pub.L. 102-166, § 105(a), added subsec. (k).

Subsec. (l). Pub.L. 102-166, § 106, added subsec. (*l*).

Subsec. (m). Pub.L. 102-166, § 107(a), added subsec.

(m).

Subsec. (n). Pub.L. 102-166, § 108, added subsec. (n).

1972 Amendments. Subsec. (a)(2), Pub.L. 92-261, § 8(a), added "or applicants for employment" following "his employees".

Subsec. (c)(2). Pub.L. 92-261, § 8(b), added "or applicants for membership" following "membership".

Effective Dates

1991 Acts. Amendment by Pub.L. 102-166 effective Nov. 21, 1991, except as otherwise provided, see section 402 of Pub.L. 102-166, set out as a note under section 1981 of this title.

For applicability of Pub.L. 102-166 to any disparate impact case for which a complaint was filed before Mar. 1, 1975, and for which an initial decision was rendered after Oct. 30, 1983, see, also, section 402 f Pub.L. 102-166.

1964 Acts. Section effective one year after July 2, 1964, see section 716 of Pub.L. 880-352, set out as a note under section 2000e of this title.

Effect of 1991 Amendment Upon Court-Ordered Remedies, Affirmative Action, and Conciliation Agreements

The amendments made by Title I of Pub.L. 102-166

were not to be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that were in accordance with the law, see section 116 of Pub.L. 102-166, set out as a note under section 1981 of this title.

Severability of Provisions

Invalidation of provision, amendment or application of Pub.L. 102-166 not to affect remaining provisions, amendments and applications, see section 401 of Pub.L. set out as a note under section 1981 of this title.

Alternative Means of Dispute Resolution Encouraged

The use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising. . .

APPENDIX N

42 USCS § 2000E-1 (1996) printed in FULL format.

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*** CURRENT THROUGH P.L. 104-305, 10/13/96 ***
*** EXCEPT FOR PLs 208, 286-287, 290, 294-295, 297-304 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CF-APTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

42 USCS § 2000e-1 (1996)

§ 2000e-1. Title not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies

(a) This title [*42 USCS §§ 2000e* et seq.] shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment, of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) It shall not be unlawful under section 703 or 704 [*42 USCS §§ 2000eo2* or 2000e-3] for an employer (or a

corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

(c) (1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 703 or 704 § *42 USCS.§ 2000e-2* or 2000e-3] engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 703 and 704 [*42 USCS § 2000e-2* or 2000e-3] shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on--

(A) the interrelation of operations;

(B) the common management;

(C) the centralized control of labor relations; and

(D) the common ownership or financial control, of the

employer and the corporation.

§HISTORY: (July 2, 1964, P.L. 88-352, Title VII, § 702, 78 Star. 255; Mar. 24, 1972, P.L. 92-261, § 3, 86 Star. 103.)

(As amended Nov. 21, 1991, P.L. 102-166, Title I, § 109(b) (1), 105 Star. 1077.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

EFFECTIVE DATE OF SECTION:

Section 716(a) and (b) of Act July 2, 1964, provided: "(a) This title *[42 USCS §§ 2000e* et seq.] shall become effective one year after the date of its enactment.

"(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 *[42 USCS §9 2000e-2,* 2000e-3, 2000e-5, 2000e-6] shall become effective immediately."

AMENDMENTS:

1972. Act Mar. 24, 1972, substituted section for former section, which read: "This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

1991. Act Nov. 21, 1991 (effective on enactment and applicable as provided by § 402 of such Act, which appears as *42 USCS 9 1981* note, and applicable as provided by §§ 109(c) and 402 (b) of such Act, which appear as notes to this section and *42 USCS 9 1981,* respectively) designated the existing text as subsec. (a); and added subsec. (b) and (c).

NOTES:

CODE OF FEDERAL REGULATIONS

Nondiscrimination requirements, 12 CFR Part 528.

RESEARCH GUIDE

FEDERAL PROCEDURE L ED:

21 Fed Proc, LEd, Job Discrimination, 99 50:1, 85, 127, 144, 480, 488, 576.

AM JUR:

15 Am Jur 2d, Civil Rights 99 3, 98, 114, 203, 211.

45A Am Jur 2d, Job Discrimination §9 4, 96, 187, 216, 264.

45A Am Jur 2d, Job Discrimination (1993) §9 52, 54, 115, 294.

AM JUR TRIALS:

Employment Discrimination Action Under Federal

42 USCS § 2000E-1 (1996)

Civil Rights Acts, 21 Am Jur Trials, p. 1.

AM JUR PROOF OF FACTS:

Union's Breach of Duty of Fair Representation, 15 Am Jur Proof of Facts 2d, p 65.

APPENDIX O

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

May 30, 1995

BROTHER GABRIEL M. WARD, Plaintiff,	) CASE NO. CV 94 10 3522
vs.	) JUDGE CALLAHAN
FATHER JOHN HENGLE, PASTOR, c/o OUR LADY OF VICTORY CHURCH, et al., Defendants.	)

DEFENDANTS' FATHER JOHN HENGLE, ET AL., MOTION FOR SUMMARY JUDGMENT

Now come Defendants, Father John Hengle, et al., and hereby move the Court for Summary Judgment upon all claims asserted in this action. This Motion is made pursuant to Rule 56(B) of the Ohio Rules of Civil Procedure upon the grounds that there is no genuine issue of material fact and that the moving Defendants are entitled to judgment as a matter of law.

This Motion is based upon the pleadings, the deposition of Plaintiff, Gabriel M. Ward, the deposition of Defendant, Father John Hengle, and a Memorandum of Law filed contemporaneously herewith.

Respectfully submitted,

/s/_____
Orville L. Reed, III (#0023522)
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Buckingham, Doolittle & Burroughs
A Legal Professional Association
50 South Main Street, P.O. Box 1500
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(216) 376-5300

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served upon Richard E. Dobbins, Esq., 3882 Bywood Drive, Akron, Ohio 44333, this 30th day of May, 1995, by first-class United States mail, postage prepaid.

/s/_____

BROTHER GABRIEL M. WARD, Plaintiff,) CASE NO.) CV 94 10 3522)
vs.) JUDGE CALLAHAN)
FATHER JOHN HENGLE, PASTOR, c/o OUR LADY OF VICTORY CHURCH, et al., Defendants.)

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. FACTUAL BACKGROUND

This action arises out of Defendants' alleged religious discrimination in the employment of Plaintiff. (See Complaint).

Over the last 15 years, the Plaintiff has sought, on numerous occasions, to gain formal recognition from the Catholic Church of a religious community he calls the "Brothers of the Annunciation of Mary". Some time in 1980, the Plaintiff petitioned the Diocese of Youngstown to start this community; however, Plaintiff's request was denied. (See Deposition of Plaintiff, Gabriel M. Ward, at pp. 13-14.) Again in January of 1980, the Plaintiff petitioned the Diocese of Cleveland to start his religious community. Id. at p. 14. No official recognition was granted by the Diocese of Cleveland.

Since the Cleveland Diocese refused to recognize the

Plaintiff's group as an official religious community, the Plaintiff decided to switch his allegiance from the Roman Rite to the Maronite Rite. Id. After petitioning Bishop Zayek of the Diocese of St. Maron in Brooklyn, New York, for official recognition for his religious community, the Plaintiff's community was granted an ad experimentum status in 1989. What prompted this petition to the Maronite Rite was the Cleveland Catholic Diocese's decision to no longer recognize the "Brothers of the Annunciation of Mary" as a public lay association. The Diocese would, however, according to Plaintiff, recognize the "Brothers" as a private lay association.

On December 31, 1993, the Diocese of St. Maron withdrew its sponsorship of the Brothers of the Annunciation of Mary because the community was not growing. Id. at p. 27. As a result of the Diocese of St. Maron's withdrawal of its official recognition, the plaintiff again sought to return to the Roman Rite Id. at p. 31. The Diocese of Cleveland has not recognized the Plaintiff's community and Plaintiff did not seek sponsorship of his community by the Cleveland Catholic Diocese. Id. at pp. 32 and 33.

Defendant, Father John Hengle ("Father Hengle"), has been the pastor of Our Lady of Victory Church in Tallmadge since July 1 of 1993. (See Deposition of Father John Hengle, hereinafter referred to as "Hengle Depo." at p. 4.) Our Lady of Victory is a Roman Catholic Church within the Diocese of Cleveland and is subject to Bishop of Cleveland. As pastor of Our Lady of Victory Church, Father Hengle answers directly to the Bishop of the Diocese of Cleveland, Anthony M. Pilla Id. at 7-8. When Father Hengle first became the pastor of Our Lady of Victory Church in 1993, the Plaintiff, Gabriel Ward, was already employed at Our Lady of Victory. Id. at p.

11. The Plaintiff was responsible for bookkeeping, payroll and accounts payable. Id. at p. 12.

After Father Hengle arrived at the church in July of 1993[1], he indicated to the staff members, including Plaintiff, that he would observe each of them for one year before he took any actions with regard to their continued employment:

> Basically what I indicated to all the staff members, when I arrived there, is that I would take a year to observe and see what they were doing before I made any particular changes in either their job roles or descriptions, and so forth. So I wanted to take the time to do that.

Id. at p. 14.

In June of 1994, Father Hengle met with the Plaintiff to discuss the renewal of the Plaintiff's employment contract. Id. at p. 16. At that time, Father Hengle informed the Plaintiff that he was required to obey the directives of the Diocese of Cleveland.

> A. What I informed him is that I would hire him, with the job description that I gave him, as a lay employee of the parish. And that if he was going to continue to work at Our Lady of

---

[1] When he came to the Parish, Plaintiff's community had some form of sponsorship through the Diocese of St. Maron. By June of 1994, Plaintiff's community had no recognition by any Rite or Diocese.

Victory, I would expect he would follow the guidelines of the Bishop of Cleveland for their community.

Q. And you never said anything, specifically, about the habit or the name?

A. He asked what I meant by that. And I told him what I had received from the Bishop's office with regard to the dress and the name.

Q. So you told him he could not wear the habit any longer?

A. No, I did not say that.

Q. What did you say?

A. I said I would expect him to abide by the Bishop's guidelines of the Diocese.

Q. Which meant?

A. Which meant, according to the guidelines, **they were not to wear the habit or use the title Brother.** But I did not say to him that he may not wear it.

Id. at pp. 39-40. (Emphasis added).

Father Hengle made it clear to the Plaintiff that as a condition of future employment with Our Lady of Victory Parish was not to wear his habit while working and could not

insist upon being addressed as "Brother":

> Q. Did you, at any time, tell him that the wearing of the habit makes the staff uncomfortable?
>
> A. I don't know if I used the specific word uncomfortable. I said I think that--if I recall, that it basically places the staff, as well as myself, in a very awkward position.
>
> Q. And what did you mean by that?
>
> A. Given the fact of the directive of the Bishop, with regard to their community, for him to continue to use the title and to wear the habit basically would be giving tactic [sic] approval.

Id. at p. 42.

Subsequently, Father Hengle refused to enter into an employment contract with the Plaintiff as a result of Plaintiff's insistence on dressing and acting in a manner directly contradictory to the directives of the Bishop of the Cleveland Diocese. See p. 48, lines 7-25) and p. 49, lines 1-9.)

Plaintiff now claims that he is the victim of religious discrimination because he, who is not the member of a sanctioned, religious community, is not permitted to wear a religious habit while working at Our Lady of Victory Parish and is not permitted to insist on being addressed as "Brother" by the staff at Our Lady of Victory Parish.

II. LAW AND ARGUMENT

A. Plaintiff's Claim Against The Defendants For Religious Discrimination Pursuant To 42 U.S.C. §2000 et seq. Is Explicitly Prohibited By 42 U.S.C. §2000e-1.

42 U.S.C. §2000e-2(a) provides that it is an unlawful employment practice for an employer:

> (1) To fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or natural origin ....

Id.

Notwithstanding this broad, statutory prohibition, Congress acted to exempt religious groups from Title VII prohibitions:

> This Title shall not apply to an employer with respect to... a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. §2000e-1.

In the instant case, it cannot be disputed that the

Defendants fit within the exemption provided in Title VII §2000e-1. The Plaintiff may argue that he was a "secular" employee of Our Lady of Victory Church; however, this distinction is without a difference under 42 U.S.C. §2000e-1.

In Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos (1987), 483 U.S. 327, the Supreme Court of the United States held that applying the religious exemption to Title VII's prohibition against religious discrimination in employment to secular non-profit activities of religious organizations did not violate the establishment clause. In that case, the Mormon church hired an individual to work at a gymnasium. The gymnasium was a non-profit facility of the Mormon church. In 1981, the employee, an assistant building engineer, was discharged because he failed to qualify for a temple recommend, a certificate that he is a member of the Church and eligible to attend its temples. Id. at 330. The lower courts held that applying the "religious organizations" exemption of 42 U.S.C. §2000e-1 violated the Establishment Clause of the First Amendment of the United States Constitution. The Supreme Court disagreed and held:

> ... [A]s applied to the non-profit activities of religious employers, §702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions.
>
> It cannot be seriously contended that §702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious

belief that the District Court engaged in this case.

Id. at p. 339.

The reasoning behind the Supreme Court's decision in Amos, supra, is instructive:

> ... [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenants and sense of mission. Fear of potential liability might effect the way an organization carried out what it understand to be its religious mission.
>
> After a detailed examination of the legislative history of the 1972 amendment, the District Court concluded that Congress' purpose was to minimize governmental 'interfer[ence] with the decision-making process in religions.' 592 F.Supp., at 812. We agree with the District Court that this purpose does not violate the Establishment Clause.

Id. at 335-336.

That exemption has been applied specifically to a situation where the attire of an employee has become the center of controversy. In granting summary judgment for the Defendant/employer, the court in Equal Employment Opportunity Commission v. Presbyterian Ministries, Inc.

(W.D. Washington 1992), 788 F.Supp. 1154, held that:

> Title VII may not be construed to force a religious institution to countenance the display of religious symbols contrary to the image and environment that the institution wishes to create and maintain. To protect Plaintiff's exercise of her religion on the premises of PMI's Exeter House, would be to favor her religious exercise over PMI's on PMI's own premises and to impermissibly interfere with PMI's operation of Exeter House. PMI justifiably considered Plaintiff's display of her own religious preference at the highly visible reception desk all the more inappropriate from its point of view. (pp. 1157, 1158)

In Equal Employment Opportunity Commission, supra, the Plaintiff, Jacqueline Brooks, worked as a receptionist at a retirement home operated by Presbyterian Ministries, Inc. Presbyterian Ministries (hereinafter referred to as "PMI") objected to the head coverings that Ms. Brooks chose to wear as required by her Muslim faith. After being told many times not to wear her head covering, and failing to abide by PMI's directives, Ms. Brooks resigned. The Presbyterian Ministries Court held:

> Section 702 [former equivalent of 42 U.S.C. §2000e-l] is an exemption that applies to PMI under the circumstances of this case. It can not be seriously disputed the Christian nature of Exeter House was obvious from the most cursory view even before the modifications of the personnel manual. ...Merely because PMI did not actively inquire to Plaintiff's religion does not provide a mechanism for an

> employee to subsequently begin to assert a non-Christian religious belief in such a manner deemed inappropriate by PMI. Such a limited interpretation of the exemption would result in intolerable intrusions into the operation of a religious entity's own agencies.
>
> Certainly, PMI may determine for itself what environment it seeks to provide in its agencies such as Exeter House. The employees' actions, attitudes, and appearances are obviously an important element in creating that environment. The receptionist position is important in conveying an initial first impression, and Exeter House must be free to determine the impression it wishes to convey; the receptionist may not dictate to PMI in this regard. Plaintiff is free to exercise her religion, but she may not do so on PMI premises in a way that PMI deems is contrary to its interests.

Id. at 1156.

In Little v. St. Mary Magdalene Parish (3rd Cir. 1990), 929 F.2d 944, a non-Catholic elementary school teacher's contract was not renewed because she failed to obtain annulment of her first marriage before remarrying. The school teacher brought a complaint pursuant to 42 U.S.C. §2000e-2. The trial court granted summary judgment on Plaintiff's Title VII claim and that order was affirmed by the Circuit Court. The court held that the religious organization exemption of 42 U.S.C. §2000e-1 applied and noted:

> Against this background and with sensitivity to the constitutional concerns that would be raised by a

> contrary interpretation, we read the exemption broadly. We conclude that the permission to employ persons "of a particular religion" includes permission to employ only persons whom beliefs and conduct are consistent with the employer's religious precepts. Thus, it does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles.

Little v. St. Mary Magdalene Parish (3rd Cir. 1990), 929, F.2d 944, 951.

In the case at bar, Father Hengle clearly stated that it was necessary for him to enforce the directives of the Bishop of the Diocese of Cleveland regarding the Brothers of the Annunciation of Mary. (Hengle Depo. pp. 41-42). It was the decision of the Bishop of the Diocese of Cleveland not to allow the Plaintiff to wear his habit and use an official title (ie., Brother) because the "Brothers of the Annunciation of Mary" is not a canonically recognized order. Father Hengle could not have allowed Plaintiff to wear his habit religious habit and be addressed by the term "Brother" without contradicting the direction of the Bishop.

Because the Defendants are clearly within "religious organizations exemption" of 42 U.S.C. 2000e-1, this Court should grant Defendants' Motion for Summary Judgment as to the Second Cause of Action of Plaintiff's Complaint.

B. Even If This Court Would Exercise Jurisdiction To

Consider Plaintiff's Complaint, Defendants Are Entitled To Summary Judgment On Plaintiff's First Cause Of Action Under R.C. §4112.02(A) Because Ohio Courts Have Determined That Case Law Interpreting Title VII Of The Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Is Applicable To Cases Involving Alleged Violations of R.C. Chapter 4112, the court should grant summary judgment on Plaintiff's First Cause of Action.

R.C. §4112.02 of the Ohio Revised Code provides:

> It shall be an unlawful discriminatory practice:
>
> (A) For any employer, because of race, color, religion, sex, natural original, handicap, age, or ancestry of any person, to discharge, without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or of any matter directly or indirectly related to employment.

Id.

Although R.C. §4112 et seq. does not have a religious organizations exception, Ohio Courts have long held that federal case law construing 42 U.S.C §2000 et seq. applies to actions brought under R.C. §4112 et seq. In Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission (1981), 66 Ohio St.2d 192, the Ohio Supreme Court observed that:

> In previous cases. . .we have determined that federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42 U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112. Republic Steel v. Ohio Civil Rights Comm. (1975), 44 Ohio St.2d 178; Weiner v. Cuyahoga Community College District (1969), 19 Ohio St.2d 35.

Id. at 196.

Because the Defendants are exempted from the requirement of 42 U.S.C. §2000 et seq., Defendants are entitled to judgment as a matter of law on Plaintiff's state law claim.

C. Defendants Are Entitled To Summary Judgment On Plaintiff's First Cause Of Action Under R.C. §4112.02(A) Because Plaintiffs Have Failed To Exhaust Their Administrative Remedies.

At paragraph fourteen (14) of Plaintiff's Complaint it is alleged that:

> The conduct of Defendants in terminating Plaintiff's employment constitutes an unlawful discriminatory practice on the basis of religion, in violation of Plaintiff's rights under the Ohio Constitution and under State law pursuant to R.C. 4112.02(A) .

Id. at ¶14.

R.C. §4112.02(A) prohibits employers from

participating in certain conduct. The Ohio legislature created the Ohio Civil Rights Commission ("OCCRC") to review claims of statutory violations. See R.C. §4112.03. The Ohio legislature also provided for an administrative process for claims brought pursuant to §4112.02(A) . See R.C. §4112.05 through R.C. §4112.11. R.C. §4112.06 provides for judicial review **after** the administrative process has been exhausted and further provides:

(C) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

Id.

In Dadas v. Prescott, Ball & Turben (N.D. Ohio 1981), 529 F.Supp. 203, the Plaintiff failed to exhaust her administrative remedies pursuant to R.C. §4112.01 et seq., in a claim for sex discrimination. As a result the District Court held that the Plaintiff was barred from pursuing relief under R.C. §4112.01 et seq.

> The Ohio legislature has established an administrative procedure for remedying sex discrimination by employers. 4112.01 et seq. The Ohio Civil Rights Commission is created by § 4112.03. Ohio Revised Code § 4112.05 authorizes this Commission to accept charges of discriminatory practices. When a complainant is aggrieved by a final order of the Commission he may seek judicial review. Ohio Revised Code § 4112.06. However, administrative procedures must first be followed. The plaintiff having

> failed to exhaust her administrative procedures may not have an action under Ohio Revised Code §4112.

Id. at 205; see also, Howard v. State Farm Insurance Co. (1978), 61 Ohio App.2d 198.

In the instant case, the Plaintiff has not exhausted his administrative remedies pursuant to R.C. 4112 et seq. Therefore, this Court lacks jurisdiction to consider Plaintiff's Complaint.

D. Even If The Religious Organizations Exemption of 42 U.S.C. 2000e-1 Did Not Apply In This Case, The Plaintiff, As A Matter of Law, Cannot Demonstrate A Case Of Religious Discrimination.

Those cases that touch upon the religious discrimination proscribed by Title VII involve requirements of a religion. Typically Plaintiffs in Title VII cases complain that they have lost employment, lost unemployment opportunity, or suffered a demotion because they cannot, by way of example only, work due to a religious obligation to worship on Saturday or Sunday. The case at bar involves no such religious requirement or obligation. Plaintiff wants the freedom to wear a religious garb (habit) to his job at Our Lady of Victory. He does not belong to a sanctioned, religious community but does admit that the garb itself, a religious robe, is a symbol of a formal, religious status. The contradiction is of no moment to the Plaintiff but is of great concern to the Bishop of the Cleveland Catholic Diocese. The Bishop has instructed the Plaintiff and the other member of this "community" that they are not recognized and are not permitted to wear a habit and call themselves "Brothers"

A ... it was in 1988, in fact, when we were told we weren't growing fast enough and that the Diocese would not call us part of it any longer, even in the experimental stage -- I forgot the term. Lay association of the Christian faithful in the public sense, would consider us to be private lay association of the Christian faithful. And, therefore, we would have to refrain from wearing our habits and calling ourselves Brothers, et cetera.

Q: The Catholic Diocese told you that?

A: Yes.

Q: Cleveland Catholic Diocese?

A: Because we didn't have 40 people in our community, they did not want to continue.

Q: That was what year that you first received that directive?

A: 1988, '87, '88, somewhere in that range. (Depo. of Plaintiff at p. 17, lines 10-25)

However, Plaintiff says he is a Catholic.

Q: Okay. You were baptized a Catholic?

A: Yes.

Q: You've been a Catholic all of your life?

A: Yes.

Q: And, of course, you would describe yourself as a practicing Catholic?

A: I would, yes. (Depo. of Plaintiff at p. 16, lines 14-20)

. . .

Q: Now, certainly, the Franciscans are Catholics; are they not?

A: Yes.

Q: It's a Catholic order?

A: Yes.

Q: And you're not suggesting that wearing a habit or not wearing a habit, by a Franciscan, is an article of faith for Franciscans, are you?

A: I am not.

Q: You are not suggesting its an article of faith for you, are you?

A: I am not.

Q: Okay. Point of fact, lots of Catholics practice their faith, and practice it diligently and faithfully without ever wearing a habit. You would agree with that; wouldn't you?

A: I sure would.

Q: In point of fact, I can be a good practicing Catholic, and never once in my life don a habit, would you agree with that?

A: I would agree with that. But I am a Franciscan Catholic.

Q: Well, you say you're a Franciscan Catholic. In whose opinion?

A: In my opinion. (Depo. of Plaintiff at p. 41, lines 4-25 and p. 42, lines 1-3)

Wearing a habit has nothing to do with the practice of the Catholic faith. It is not a tenet of the Catholic faith and never has been. Refusal to allow Plaintiff to work at Our Lady of Victory Parish as long as he wears a religious habit, does not impair his ability to practice his faith. The refusal simply runs contrary to Plaintiff's personal belief about authority:

Q: As a Catholic who was a member of the Diocese of Cleveland, how do you perceive your relationship with the Bishop?

A: Strained.

Q: Let's keep it apart from personal. How do you as a Catholic -- how would you, as a Catholic, perceive your relationship should exist between a Bishop and a member of the

Diocese?

A: Pastor.

Q: All right. And I would assume, as Pastor, you would recognize that he is permitted to give certain directives to people who profess to be Catholics within his Diocese?

A: I would.

Q: You say it's strained because of the fact that you perceive the Bishop's directives to be contrary to the document of Vatican II?

A: Yes.

Q: And you also perceive Bishop Pilla's directives, with respect to the Brothers of the Annunciation, as being in contradiction or contrary to the teaching of the Pope on religious life?

A: Yes.

Q: Is there some specific Vatican II document you could refer me to?

A: Not from memory, no. (Depo. of Plaintiff, p. 21 at lines 9-22; p. 22, lines 8-19)

Q: Can I ask you this, Brother, I don't mean to interrupt you, do you contest the right of the

Bishop, of 'the Cleveland Catholic Diocese, to issue those sorts of directives?

A: Yes.

Q: You believe he is without authority to do that?

A: Yes. I say I contest what he has said are the directives for us .... in light of that, the Bishop doesn't have any authority over us. He, in fact, will not recognize us as individual members of the Roman Catholic Church. (Depo. of Plaintiff, p. 55 at lines 9-15; p. 56 at lines 3-11)

Clearly, Plaintiff's dispute is an ecclesiastical one that concerns his views on the authority of the Bishop of the Cleveland Catholic Diocese to issue certain directives. Because at the root of this dispute is a challenge to church authority, it has no place in the courts. Moreover, it is clear that Plaintiff's claim of religious discrimination does not involve a religious tenet or belief. It involves Plaintiff's preference to dress in a particular way which is, in the opinion of the Bishop of the Cleveland Catholic Diocese, misleading to the members of the church community or Our Lady of Victory.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request this court to grant their Motion for Summary Judgment. As set forth above, Defendants are entitled to

summary judgment because:

1) Defendants are exempt from the provisions of 42 U.S.C. 2000; 2) the Ohio law proscribing religious discrimination is to be interpreted as mirroring Federal Law. Therefore, Defendants are exempt from the applicable provisions of Ohio Law; (3) Plaintiff has not exhausted his administrative remedies; and (4) Plaintiff's claim is about the authority of the Bishop of the Cleveland Catholic Diocese to enact certain directives and is not about a religious belief. Consequently, a Civil Court should not intervene in this dispute. See Dragelevich vs. Ragasich (Crt. of App. for Mahoning Cty., 1970) 24 O.App. 2d. 59.

Respectfully Submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served upon Richard E. Dobbins, Esq., 3882 Bywood Drive, Akron, Ohio 44333, this 30th day of May, 1995, by first-class United States mail, postage prepaid.

_____

Attorney for Defendants

APPENDIX P

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

Filed July 26, 1995

BROTHER GABRIEL M. WARD, Plaintiff,	) CASE NO.) CV 94 10 3522
vs.	) JUDGE CALLAHAN
FATHER JOHN HENGLE, PASTOR, c/o OUR LADY OF VICTORY CHURCH, et al., Defendants.	)

REPLY BRIEF OF DEFENDANTS IN SUPPORT OF THEIR MOTION SUMMARY JUDGMENT AND BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendants, Father John Hengle, et al., moved this Court for Summary Judgment on May 30, 1995. On June 26, 1995 Plaintiff filed his "Response to Defendant's Motion for Summary; and Plaintiff's Motion for Summary Judgment."

Construing all the evidence in a light most favorable

to the Plaintiff, no genuine issues of material fact exist and it is submitted that Defendants are entitled to judgment as a matter of law. Consequently, Plaintiff's Motion for Summary Judgment is not well taken and should be overruled by this Court.

II. LAW AND ARGUMENT IN RESPONSE TO PLAINTIFFS REPLY

A. As A Matter Of Law Plaintiff Has Not Been Discriminated Against On The Basis Of Religion.

In Ohio, there is very little case law construing R.C. §4112.02(A). See e.g., Southwind Motel v. Ohio Civil Rights Commission (Franklin County 1985), 24 Ohio App.3d 209. However, the Sixth Circuit Court of Appeals has, on many occasions, construed the similar federal statute of 42 U.S.C. §2000, et seq. As it was pointed out in the Defendants Motion for Summary Judgment, Ohio courts have long held that federal' case law construing 42 U.S.C. §2000, et seq. applies to actions brought under R.C. §4112, et seq. See Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission (1981), 66 Ohio St.2d 192, 196.

In Cooper v. Oak. Rubber Company, (6th Cir. 1994), 15 F.3d 1375, the Sixth Circuit Court of Appeals explained the elements of a prima facie case of religious discrimination:

> The employee bears the burden of establishing a prima facie case, and sustains that burden by showing that he holds a sincere religious belief that conflicts with an employment requirement; that he has informed his employer of the conflict; and that he was discharged

> or disciplined for failing to comply with the conflicting requirement. Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987) .... Once a prima facie case is established, the burden shifts to the employer to show that it could not reasonably accommodate the employee without undue hardship. The reasonableness of an employer's attempt to accommodate is determined on a case-by-case basis. If the employer's efforts fail to eliminate the employee's religious conflict, the burden remains on the employer to establish that it is unable to reasonably accommodate the employee's beliefs without incurring undue hardship. Id. To require an employer to bear more than a de minimis cost in order to accommodate an employee's religious beliefs is an undue hardship. TransWorld Airlines, Inc. v. Hardison, 432 U.S. 63, 84... (1977).

Id. at 1378; see also, Equal Employment Opportunity Commission v. Arlington Transit Mix, Inc. (6th Cir. 1991) 957 F.2d 219.

In the instant case, the Plaintiff has totally failed to carry his burden to establish a prima facie case of religious discrimination. In point of fact, the Plaintiff has failed to establish that he holds a "sincere religious belief that conflicts with an employment requirement .... " Id. The Plaintiff wants the freedom to wear religious garb (a habit) to his job at Our Lady of Victory Church. The Plaintiff admits that his garb, a religious robe, is a symbol of a formal, religious status. However, as pointed out in Defendants' Motion for Summary Judgment (at page 13), the Plaintiff has no formal, religious status within the Catholic church. Even more telling,

however, is the patent admission of the Plaintiff that the wearing of his habit is not an article of faith for him.

Q: Okay. You were baptized a Catholic?

A: Yes.

Q: You've been a Catholic all of your life?

A: Yes.

Q: And, of course, you would describe yourself as a practicing Catholic?

A: I would, yes.

Q: Now, certainly, the Franciscans are Catholics; are they not?

A: Yes.

Q: It's a Catholic order?

A: Yes.

Q: And you're not suggesting that wearing a habit or not wearing a habit, by a Franciscan, is an article of faith for Franciscans, are you?

A: I am not.

Q: Are you not suggesting it's an article of faith for you, are you?

A: **I am not.**

Q: Okay. Point of fact, lots of Catholics practice their faith, and practice it diligently and faithfully without ever wearing a habit. You would agree with that; wouldn't you?

A: I sure would.

Q: In point of fact, I can be a good practicing Catholic, and never once in my life don a habit, would you agree with that?

A: I would agree with that. But I'm a Franciscan Catholic.

Q: Well, you say you're a Franciscan Catholic. In whose opinion?

A: In my opinion.

(Depo. of Plaintiff at p. 16, lines 14-20; p. 41, lines 4-25; p. 42, lines 1-3). (Emphasis added).

What is at issue in this case is not a "sincere religious belief"; rather, what is involved is the Plaintiff's view of authority within the Catholic church and his own arbitrariness.[11]

---

[1] Plaintiff is not a member of the Franciscan Order. But even if he were, the Franciscan Order does not require the wearing of a religious habit.

Q: ...[Y]ou perceive the Bishop's directives to be contrary to the document of Vatican II?

A: Yes.

Q: And you also perceive Bishop Pilla's directives, with respect to the Brothers of the Annunciation, as being in contradiction or contrary to the teaching of the Pope on religious life?

A: Yes.

Q: Can I ask you this, Brother, I don't mean to interrupt you, do you contest the right of the Bishop, of the Cleveland Catholic Diocese, to issue those sorts of directives? [viz., Bishop Pilla's directives against Plaintiff wearing a habit].

A: Yes.

Q: You believe he is without authority to do that?

A: Yes. I say I contest what he has said are the directives for us .... In light of that, the Bishop doesn't have any authority over us. He, in fact, will not recognize us as individual members of the Roman Catholic Church.

(Depo. of Plaintiff, p.21 at lines 9-22; p.22, lines 9-18; p. 55 at lines 9-15; p. 56 at lines 3-11).

Thus, Plaintiff's own words indicate that this is not a

case involving religious discrimination because, in Plaintiff's own words, the wearing of the habit is not an article of faith for him.

Even if the Plaintiff claimed that as a Franciscan he was required to wear certain garb, he is incorrect. (See Affidavit of Reverend Robert W. Schrauf, O.F.M. CAP attached hereto as Exhibit "A"). Reverend Schrauf is an ordained Catholic priest and a member of the Order of St. Francis. Id. at ¶¶1-3. Reverend Schrauf affirms that as a member of the Franciscan Order, he is personally familiar with the Rule of St. Francis. Id. at ¶7. Reverend Schrauf asserts:

> 8. That the Rule of St. Francis does not require that a habit be worn by Franciscan priests and brothers at all times;
>
> 9. That the request of an employer that a habit not be worn by a Franciscan priest/brother working for said employer would be honored by the Franciscan employee;
>
> 10. That not wearing a habit is not a violation of the spirit or the letter of the Rule of St. Francis.

Id. at ¶¶8-10. (Emphasis in original).

Given the admissions of the Plaintiff and the assertions of Reverend Schrauf, it is clear that the Plaintiff's claim does not involve a religious tenet or belief. It involves Plaintiff's preference to dress in a particular way which, in the opinion of the Bishop of the Cleveland Catholic Diocese, is

misleading to the members of the church community of Our Lady of Victory.

The Plaintiff's preference to wear religious garb while at work does not rise to the level of a "religious belief" for the purposes of R.C. §4112.02(A). The United States Supreme Court has enunciated a test to determine whether an individual's beliefs are "religious". See United States v. Seeger (1965), 380 U.S. 163. The Court's definition is instructive:

> A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.

Id. at 176.

Plaintiff's preference to wear religious garb while at work also does not rise to the level of religious practice as defined by the Code of Federal Regulations:

> ...[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.

29 C.F.R. ¶1605.1

The Fifth Circuit Court of Appeals has also identified three major factors which enter into a determination of whether a belief is "religious":

> The "religious" nature of a belief depends on (1) whether the belief is based on a theory of 'man's nature or his place in the universe', (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is sincere.

Brown v. Dade Christian Schools, Inc. (5th Cir. 1977), 556 F.2d 310, 324 (dissent) (citations omitted), cert. denied (1978), 434 U.S. 1063.

Furthermore, the United States Supreme Court has characterized a "religious belief or practice" as "**...not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.**" Wisconsin v. Yoder (1971), 406 U.S. 205, 215-16. (Emphasis added); see also, Brown v. Pena (5th Cir. 1978), 589 F.2d 143.

The only case cited by the Plaintiff in his brief on the subject of grooming as the basis for religious discrimination is Bhatia v. Chevron U.S.A., Inc. (9th Cir. 1984), 734 F.2d 1382, per curiam. Bhatia, however, actually demonstrates why the instant case does not rise to the level of religious discrimination.

In Bhatia, supra, an employee sued Chevron for religious discrimination. Chevron had adopted a safety policy requiring all employees, who were potentially exposed to toxic gases, to wear a respirator while at work. Id. at 1383. The Plaintiff was a machinist who was regularly exposed to toxic gas. Id. The Plaintiff's beard, however, would not allow an airtight seal to form around his face. Id. Thus, the Plaintiff was informed that he would have to shave his beard.

Id. The Plaintiff informed Chevron that he could not comply with its request because he was a devout Sikh and his religion proscribes the cutting or shaving of any body hair. Id. Given this set of facts the Court held:

> Bhatia established a prima facie case of religious discrimination by proving that he had a bona fide belief that shaving his beard would be contrary to the Sikh religion, that he informed Chevron of his belief, and that Chevron thereafter removed him from his machinist job.

Id. (Emphasis added).

Because the Plaintiff himself has admitted that wearing the Franciscan garb is not an article of faith [Clearly it is not. See Affidavit of Rev. Robert Schrauf.] and because the wearing of the garb is merely an arbitrary preference of the Plaintiff, and based upon the affidavit of Rev. Robert Schrauf, a cause of action for religious discrimination pursuant to R.C. §4112.02(A) cannot, as a matter of law, be established. Therefore, on this basis, this Court should grant Defendants' Motion for Summary Judgment.

B. This Court May Not Intervene In A Dispute Between the Plaintiff And The Hierarchy Of The Roman Catholic Church Because the First Amendment To The United States Constitution Prohibits Civil Courts From Adjudicating Controversies Over Religious Doctrine And Practice.

In a decision that even predates the First Amendment

being applied to the States via the Fourteenth Amendment, the United States Supreme Court held:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all.
>
> The law knows no heresy, and is committed to the support to of no dogma, the establishment of no sect .... All who unite themselves to such a body [the church] do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of the ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Watson v. Jones (13 Wall. 1871), 80 U.S. 679, 728-29. (Emphasis added).

The rule elicited in Watson, supra, was established into a constitutional principle of law in Kedroff v. St. Nicholas Cathedral (1952), 344 U.S. 94 in which the court observed:

> The opinion [in Watson v. Jones] radiates.., a spirit of

> freedom for religious organizations, and independence from secular control of manipulation--in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

Id. at 116; see also, Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church (1969), 393 U.S. 440.

In Serbian Orthodox Church v. Kelemen (1970), 21 Ohio St.2d 154, the Ohio Supreme Court was forced to determine a property dispute between two ecclesiastical bodies in light of the Supreme Court of the United States' decision in Presbyterian Church, supra. Applying the First Amendment Establishment Clause principles enunciated in Presbyterian Church, the Ohio Supreme Court observed:

> While we recognize that these matters of internal church organization are chronic sources of disagreement for the parties and are frequently mentioned in the pleadings, briefs and arguments, the findings of the Court of Appeals are unnecessary and immaterial to a *neutral* law inquiry utilizing principles of law developed for use in property disputes. Further, the *Hull Memorial* case offers the strong suggestion that civil courts cannot constitutionally determine matters of church government.

Id. at 159.

The case law cited supra, is clear. A Civil Court should not intervene in a dispute between a

parishioner/employee and the Bishop of the Diocese of Cleveland regarding the Bishop's authority to issue directives regarding matters of dress for individuals not officially recognized by the Roman Catholic Church. Essentially what is involved in the case at bar is a controversy over religious authority. Such was the case in Dragelevich v. Rajsich (1970), 24 Ohio App.2d 59 in which the Court of Appeals for Mahoning County held:

> 1. The First Amendment to the United States Constitution prohibits civil courts from adjudication of controversies over religious doctrine and practice.
>
> 2. Religious organizations have the power to decide matters of church government for themselves, free from state interference ....
>
> 3. In the absence of fraud, collusion, or arbitrariness, the decisions of proper church tribunals on matters purely ecclesiastical, such as the appointment of a clergyman, although affecting civil rights are accepted in litigation before the secular courts as conclusive.

Id. at ¶¶1-3 of the syllabus.

The First Amendment to the United States Constitution as applied to the States via the Fourteenth Amendment, as recognized by the case law supra, prevents this Court from adjudicating a controversy over the religious authority of the Bishop of the Cleveland Catholic Diocese. Because the heart of the instant case involves a dispute between the Plaintiff and the hierarchy of the Roman Catholic Church, this Court must,

as a matter of constitutional mandate, refrain from intervening.

C. Plaintiff's Claim Against The Defendants For Religious Discrimination Pursuant to 42 U.S.C. §2000, et seq., Is Explicitly Prohibited By 42 U.S.C. §2000e-1.

In Plaintiff's Brief, Plaintiff argues, without the benefit of citation to applicable law, that the Defendants somehow waived the religious organization exemption provided by 42 U.S.C. §2000e-1. (See Plaintiff's Brief at pp. 7-9).

> Plaintiff contends that the adoption and carrying out of an express policy of nondiscrimination in employment on the basis of religion constitutes a waiver of the exemption under 42 U.S.C. 2000e-1 that otherwise allows a religious organization to practice religious discrimination in employment. At the very least, this presents a genuine issue of material fact as to waiver of the protection of the exemption, which therefore precludes the granting of summary judgment on Plaintiff's claims under 42 U.S.C. 2000 et seq.

Id. at 8-9.

Notwithstanding Plaintiff's assertion of a novel, insupportable legal theory, 42 U.S.C. §2000e-1 unequivocally provides:

> This title shall not apply to an employer with respect to... a religious corporation, association, educational institution, or society with respect to the employment

> of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Id.

As pointed out in Defendants' Motion for Summary Judgment previously filed with this Court, this religious organization exemption applies equally to a religious organization's religious activities and non-religious activities. See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos (1987), 483 U.S. 327.[2]

Because the religious organization exemption is applicable in this case, Plaintiff's claims pursuant to 42 U.S.C. §2000, et seq. are without merit. Therefore, Summary Judgment on Count II of Plaintiff's Complaint in favor of Defendants should be granted.

D. Plaintiffs Claim Against The Defendants For Religious Discrimination Pursuant To 42 U.S.C. §2000, et seq., Is Prohibited Because The Plaintiff Failed To Exhaust His Administrative Remedies With The EEOC.

Furthermore, even if the Plaintiff's claim was not

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[2] The Defendants direct this Court's attention to the law cited in their previously-submitted Motion for Summary Judgment at pp. 5-9.

explicitly prohibited by 42 U.S.C. §2000e-i, the Plaintiff's claim would be barred because he did not exhaust his administrative remedies with the Equal Employment Opportunity Commission [EEOC]. It is well-settled law that no Title VII claim may be brought until the administrative remedies have been exhausted. See Haithcock v. Frank (6th Cir. 1992), 958 F.2d 671, 675; see also, Ang v. Proctor & Gamble Co. (6th Cir. 1991), 932 F.2d 540, 545; see also, Weeden v. Frank (6th Cir. 1994), 16 F.3d 1223, cert. denied (1995), 115 S. Ct. 1114.

In the instant case, there is no evidence to indicate that the Plaintiff filed any claim with the EEOC. Without such evidence, Plaintiff's claim pursuant to 42 U.S.C. §2000e et seq. is improper and summary judgment should be granted forthwith on this claim.

III. LAW AND ARGUMENT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

As indicated supra, the Plaintiff .has totally failed to establish a prima facie case of religious discrimination pursuant to R.C. §4112.02(A). Therefore, Plaintiff's Motion for Summary Judgment is not well taken. However, should this Court determine that the Plaintiff has established a prima facie case for religious discrimination pursuant to R.C. §4112.02(A), genuine issues of material fact exist regarding whether accommodation of the Plaintiff's practice would have caused an undue burden to the Defendants.

As indicated in the Defendants' Motion for Summary Judgment previously filed with this Court, the Plaintiff is not

a member of a recognized religious order. Defendant, Father John Hengle ("Father Hengle"), is the pastor of Our Lady of Victory Church in Tallmadge. In his position as pastor, Father Hengle answers directly to the Bishop of the Diocese of Cleveland, Anthony M. Pilla. (Hengle Depo. at p. 7-8). In June of 1994, Father Hengle met with the Plaintiff to discuss the renewal of Plaintiff's employment contract. Id. at 16. At that time, Father Hengle informed the Plaintiff that he was required to obey the directions of the Diocese of Cleveland. Id.

A: What I informed him is that I would hire him, with the job description that I gave him, as a lay employee of the parish. And that if he was going to continue to work at Our Lady of Victory, I would expect he would follow the guidelines of the Bishop of Cleveland for their community.

Q: And you never said anything specifically, about the habit or the name?

A: He asked what I meant by that. And I told him what I had received from the Bishop's office with regard to the dress and the name.

Q: So you told him he could not wear the habit any longer?

A: No, I did not say that.

Q: What did you say?

A: I said I would expect him to abide by the Bishop's guidelines of the Diocese.

Q: Which meant?

A: Which meant, according to the guidelines, **they were not to wear the habit or use the title Brother.** But I did not say to him that he may not wear it.

Id. at pp. 39-40. (Emphasis added).

Father Hengle also made it clear to the Plaintiff that the reason for his decision was premised on the fact that the Plaintiff was not a member of a recognized religious order and that the Diocese could not give tacit approval to his activities. Id. at p. 42. Therefore, should this Court determine that the Plaintiff has established a prima facie case for religious discrimination, genuine issues of material fact exist regarding whether Plaintiff's practices constituted an "undue burden" on the Defendants.

IV. CONCLUSION

Based upon the foregoing, the Defendants respectfully request that Plaintiff's Motion for Summary Judgment be denied and that Defendants' Motion for Summary Judgment be granted.

Respectfully submitted,

_____

Orville L. Reed, III (#0023522)

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Defendants in Support of Their Motion for Summary Judgment and Brief in Opposition to Plaintiff's Motion for Summary Judgment has been served upon Richard E. Dobbins, Esq., 3882 Bywood Drive, Akron, Ohio 44333, this 26th day of July, 1995, by first-class United States' mail, postage prepaid.

/s/_____
Orville Reed

APPENDIX Q

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

Dated April 12, 1996

GABRIEL M. WARD,	) CASE NO. 94-10-3522
Plaintiff,	) C. A. NO. 18234
	) Volume 1 (of 3)
vs.	) **TRANSCRIPT OF**
	) **PROCEEDINGS**
FATHER J. HENGLE,	)
et al.,	)
Defendants.	)

APPEARANCES:

RICHARD DOBBINS and NICHOLAS SWYRYDENKO,
Attorneys at Law,
On Behalf of the Plaintiff.

ORVILLE REED,
Attorney at Law,
On Behalf of the Defendants.

- - -

BE IT REMEMBERED that upon the hearing of the above-entitled matter in the Court of Common Pleas, Summit County, Ohio, before the Honorable Michael T. Callahan,

Judge Presiding, commencing on April 12, 1996, the following proceedings were had, being a Transcript of Proceedings:

MAXINE A. HOSCH, RPR
Official Court Reporters
Summit County Courthouse
Akron, Ohio 44308

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have.

THE COURT: Thank you.

CROSS-EXAMINATION

By Mr. Reed:

Q. Father, just a couple of questions about some of the testimony that you've offered here today.

Let's do a little time line. 1995 you are ordained and you become a priest; is that correct?

A. That's correct.

Q. And, Father, this religion that you now belong to, Autocephalous Orthodox Church, that is not the Catholic Church, I take it?

A. That's correct, it is not the Roman Catholic church.

Q. That is the A-U-T-O-C-E --

A. C-E-P-H --

Q. A-L-U-S?

A. Yes. I think it's O-U-S.

Q. O-U-S. Okay. I'm sorry.

And this ordination took place in your new place out at New Riegel out in the western part of the State?

A. Yes.

Q. Now, Father, you told us how, in roughly late June of the year of 1994, you had this conversation with

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Father Hengle about continuing employment at Our Lady of Victory Parish and how that didn't work out and basically because of the fact that you wanted to continue to wear the habit, right?

A. That's correct.

Q. Okay. Now, between 1994, then, let's say July of 1994 and your ordination which occurred in -- was that October?

A. September 29th.

Q. And, Father, could you tell us what -- what you did by way of employment during that period of time.

A. I was not employed.

Q. And can you tell us what you did to look for employment between July of 1994 and the time you left for New Riegel.

A. Coincidentally I was -- we were told by the -- I believe it was on July 1st of '95 we were told that, from the hospital authorities at Edwin Shaw, that we would have to give back two of our buildings and we needed three to continue the group home and --

Q. Father, can I stop you for just a second? You said July of '95, would it have been July of '94 when you were given this information?

A. No, July of '95.

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Q. July of '95. Go ahead, I apologize.

A. So, we needed to relocate our group home, previous to that time I was merely managing the group home and I was helping as self-employed, I guess, if you would, other parishes in the Diocese in Northeast Ohio with computer problems.

I had established somewhat of a reputation from Our

Lady of Victory that I could help parishes do things and they had been calling me since '87 or '88 and so I did that for a couple of parishes and then I did work, again, as a self-employed consultant for Nativity Parish in Uniontown until we moved and began being hectic about the move July of '95.

So, from July of '94 to July of '95 it was pretty much anything I could find and managing the group home.

Q. Father, would you tell us exactly how much money you earned in doing these jobs with computers.

A. I cannot tell you exactly.

I can only say it was a dollar more than we needed. We barely made ends meet, but we always seemed to pay the bills when they came due.

Q. In 1995 when you went out to New Riegel, how many members of your community went with you?

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A. At what time, sir?

Q. In 1995 when you out to New Riegel, how many members of the community went with you?

A. There were five.

Q. And how many members are in the community now?

A. Three.

Q. In 1994 when you were working Our Lady of Victory Parish in July when your employment was coming to an end, how many people were in your community?

A. What year?

Q. Let's say July of the year 1994.

A. Well, in July of '94 I wasn't employed there.

Q. In July of 1994, Father, whether you were working there or not, how many people were in your community?

A. There were four of us, then.

Q. In 1988 when you received some sort of sponsorship or recognition from Father Bishop Zayek from the Maronite Rite, how many people were in your community, Father?

A. I believe there were six.

Q. And let's say in 1983 using that as a watershed year because that's when Canon Law changed, how many people were in your community then?

A. There were 12.

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Q. And those were all brothers?

A. Yes.

Q. So, your numbers have gone from 12 to 3; is that correct?

A. Yes.

Q. All right. 1988 is when Bishop Pilla indicates to you that you're not going to have any sort of recognition at all from the Cleveland Catholic Diocese; is that correct?

A. That is correct.

Q. And in 1988, that same area year, is when you seek some sort of sponsorship from another bishop and it happens to be Bishop Zayek from the Maronite Rite; is that correct?

A. That's correct.

Q. Up to 1988 when you still had some sort of status with Cleveland Catholic Diocese, did you wear your habit to work?

A. Yes.

Q. What did that habit consist of?

A. Predominantly my black pants and shirt and the brother's collar.

Q. In fact, it did not generally consist of this habit that you are now wearing and which shows up in these pictures, did it?

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A. What year again? Just during that period?

Q. Well, let's say from 1983 to 1988 when you lost your status with Cleveland Catholic Diocese, did you not wear that blue habit --

A. Yes, I did.

Q. -- to work everyday?

A. Yes, I did.

Q. You wore it to work everyday?

A. Yes, I did because at that time in '83 to the end of '84, the only time I worked there was on Sunday for the choir.

Q. Okay. All right.

A. And if I went there during the evening for a meeting or something along that line with the Liturgy Commission I always wore my habit for that. I never wore anything but my habit then and by "habit" I mean my tunic and capuche.

Q. Let's talk about when you started doing computer

work, then, at Our Lady of Victory Parish and you were working at the office.

A. Right.

Q. That started at what year, Father?

A. January of 1986.

Q. January of 1986.

1986 to 1988, during that two-year period

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before you lost the sponsorship of the Cleveland Catholic Diocese it would be fair to say that you did not wear your blue habit, your blue tunic, your capuche to work at Our Lady of Victory Parish on a daily basis, did you?

A. I did not wear my tunic because many times I would have to crawl up in the wall and work with wires for the computer and so with permission from the community I wore black pants and black shirt and brother's collar which was one of the attires that was considered our habit.

Q. Father, did I understand you to say the answer to my question was no?

MR. DOBBINS: Your Honor, I object. He has answered the question fully and completely.

THE COURT: Overruled.

MR. REED: Thank you, Your Honor.

By Mr. Reed:

Q. Was the answer to my question no, you didn't wear that blue tunic on a daily basis between 1986 when you started working there on computers until 1988 when you lost the sponsorship of the Cleveland Catholic Diocese, that's true, isn't it?

A. Yes.

Q. All right. Now, in 1988, in 1988 you acquire kind

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of a different status with the Maronite Rite, do you not?

A. It was actually a very similar status, but, yes.

Q. And, as a matter of fact, if I understand you correctly, Father, when you, in fact, got this sponsorship from Bishop Zayek and from the people in New York, the Maronite Rite, they encourage you, he encouraged you to wear that blue habit all the time, right?

A. Correct.

Q. All right. But, in 1994 you totally lost that sponsorship, did you not?

A. December of 1993.

Q. December, excuse me, thank you.

December of 1993 you lost that sponsorship, correct?

A. That's correct.

Q. It was that sponsorship that authorized you, in fact, to wear that tunic or that habit to work on a daily basis; isn't that correct?

A. I suppose, yes.

Q. In point of fact, Father, you had never received authorization or permission from the Cleveland Catholic Diocese to wear that blue habit or blue tunic outside of your community dwelling, did you?

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A. Well, that's a little ambiguous because the vicars for religious, I believe here [sic] name was Sister Rosemary Robinson, told us many times it was -- that is not an important part of religious life, but we felt it was. And Bishop Sheldon was the bishop of the southern tier of the Diocese in Cleveland told us that he thought it was important so we considered that the Diocese was tacitly giving us permission to wear our habits as a part of the function.

Q. Father, are you telling the jury Sister Rosemary Robinson authorized you to wear that blue habit in

public outside your community?

A. I didn't say that at all, no.

Q. And you don't contend that, no?

A. I didn't intend that, no.

Q. In point of fact, Sister Rosemary was the Director of Religious Orders 1983, 1988 when you did have some sort of sponsorship from the Cleveland Catholic Diocese; isn't that correct?

A. Yes.

Q. And she was followed in that position by Sister Christine Rody with whom you had some dealings?

A. Yes.

Q. Now, Father, you, in fact, followed the Rule of St.

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Francis, do you not?

A. Yes.

Q. And St. Francis, of course, established the Franciscan order about the 12th century or is -- is that right?

A. Yes.

Q. Although you are not a Franciscan, you subscribe to that rule; is that right?

A. I consider myself to be a Franciscan and although I'm not attached by any Code of Canon Law or any document that says yep you're attached, we have a spiritualist affiliation with the Order of Friars Minor Conventional.

Q. Okay. Father, just so we're clear on this, you follow the rule of St. Francis but you are not Franciscan; is that right?

A. I am a Franciscan because I follow the rules of St. Francis.

Q. Father, you could agree with me, then, would you not, that it is not a part of the Franciscan Rule that habits be worn at all times, is it?

A. Yes, it is. It's written in the rule.

Q. Okay. Just so I'm clear on this, it is your testimony here under oath that it is the rule of the Franciscan order, the rule of St. Francis,

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that, in fact, its brothers and its priests wear the habit at all times; is that right?

A. The rule states --

Q. Is that right, Father?

A. Yes, it is.

Q. And, Father, that is why you noticed way back in 1994 in your dealings with Father Hengle that you wanted to wear that habit at all times, is that correct, because that's what you believe the Rule of St. Francis is?

A. Yes.

Q. Father, wearing a habit is not an article of faith for you, is it?

A. No, it is not.

(Defendant's Exhibit A was marked for identification.)

By Mr. Reed:

Q. Father, you would agree with me, would you not, that that garb that you have, that habit, that tunic that you're wearing here today, it connotes a formal religious status, does it not?

A. No, because it's blue it's identifiable to the Brothers of the Annunciation of Mary.

Q. Father --

Q. Which is not a formal religious community in the

[p.227]

sense of the Catholic church recognition.

Q. Now, Father, are you telling the folks on this jury that wearing that habit, wearing that habit does not connote a formal religious status to people that might be looking at you such as the people on the jury?

A. Yes, it is.

Q. It does connote a formal religious status, doesn't it?

A. Not recognized by the Diocese of Cleveland or the Roman Catholic Church, but our religious community is Orthodox and our bishop has sanctioned our habit.

Q. Father, you would agree with me, would you not, that if a gentleman like you, a priest like you, puts on that -- puts on that robe, that tunic, you are telling the world that you have a special status, are you not?

A. Yes.

Q. All right. Just, for example, as Judge Callahan with the robe that he has on there today, the very fact that he has on those robes is a sign to us that he has special status; isn't that correct?

A. That is correct.

Q. It is a sign that tells us -- it is a sign that

[p.229]

tells us that the person who is wearing that has a special status, correct?

A. That is correct.

Q. Now, in point of fact, in point of fact, back in, let's say 1994 at the time that you were dealing with Father Hengle on the matters of this contract, you insisted on wearing that habit, you had no formal status with any diocese, did you?

A. I did at the time of our discussion.

Q. Father, again, in June of the year 1994, you had a formal status with what diocese?

A. Diocese of Mary our Queen.

Q. Mary our Queen?

A. Correct.

Q. And what diocese is that, Father?

A. That is the diocese that belongs to Bishop James Mannion.

Q. Father, correct me if I'm wrong, you've told us, you've told us that you had a -- you had a recognition with the Cleveland Catholic Diocese that stretched through the late '70s up to 1988, correct?

A. I believe it was November of 1981 until somewhere around November of 1988.

Q. Thank you. And then between 1988 and 1993,

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December of the year 1993, you had a -- you had a status with Maronite Rite out of New York, Brooklyn, New York; is that correct?

A. That's correct.

Q. In fact, as you pointed out already, it was because of that status that you wore that tunic to your job at Our Lady of Victory?

A. Correct.

Q. All right.

A. But more because I felt called to be a member of the religious community, the Brothers of the Annunciation of Mary, that is our title.

Q. Now, you're telling the folks on this jury that you had a status with another diocese that commenced when?

A. Approximately February of '94.

Q. February of 1994.

Now, this is not a -- you had an affiliation with a

diocese, is this the Autocephalous church?

A. That's correct.

Q. That is not a Catholic diocese, is it, it's not Catholic, is it?

A. That's correct.

Q. Well, Father, when your deposition was taken back in 1995, back in May of 1995, you represented that you were a Catholic?

A. No. I represented that on the rolls of the Catholic Church I was considered a Maronite Catholic.

MR. REED: Your Honor, can I have one moment, please. I will apologize, Father, I can't find something.

Thank you, Your Honor.

By Mr. Reed:

Q. Father, you recall way back in May of the year 1995, May 3rd, 1995 when I took your deposition in Mr. Dobbins' and Mr. Swyrydenko's office, you recall that, don't you?

A. Yes, I do.

Q. As a matter of fact, you were under oath at that time, were you not?

A. I beg your pardon?

Q. You were under oath at that time?

A. Yes, I was.

Q. Just as you were put under oath here today by the court before you took the witness stand, correct?

A. Yes.

Q. And you were asked a series of questions about the claims that you're making against Father Hengle and the Cleveland Catholic diocese and Father Hengle's

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parish Our Lady of Victory, were you not?

A. Yes.

Q. And your lawyers were present?

A. Yes, they were.

Q. And there was a Court Reporter present just like Maxine that was taking down my questions and your answers; is that correct?

A. That's correct.

Q. And I asked you these questions on -- Rick, page 16 lines 14 and following.

Question by myself. "Okay. You were baptized a Catholic?

"Answer: Yes.

"Question: You've been a Catholic all your life?

"Answer: Yes.

"Question: And you would describe yourself as a practicing Catholic?

"Answer: I would, yes."

Now, Father, this was taken in May of the year of 1995. Now, are you telling the folks of this jury that way back prior to that, a year before that or so, 11 months before that, you had a recognition from someone from a bishop from a religion that was not a Catholic religion?

[p.233]

A. We were talking about it, yes, and Father gave us -- Bishop Mannion gave us the authority to meet as we were.

Q. Now, Father, you told us under oath in May of the year 1995 that you were a Catholic, you were practicing Catholic and now your testimony here today is that you had a sponsorship back in 1994 from a bishop who is not a Catholic and you're relying on

that sponsorship; is that correct?

A. Well, it is correct, but you're not understanding the whole picture and I would like to explain it if I could.

Q. No, Father, you go ahead, you explain.

A. The whole picture is that Bishop Mannion is very Catholic and our community is very Catholic, all of our practices, all of our beliefs, our articles of faith are Catholic and since our ordination we have documented letters that would go to Rome and to the necessary channels to gain communion with Rome. That's our purpose, that it what it was all designed to at that time so I still consider myself a practicing Catholic.

Q. Father, you correct me if I'm wrong, but if you're trying to gain communion with the Catholic church, you are not a Catholic, are you?

[p.234]

A. That's correct.

Q. (In fact, if you had some sponsorship from this member of the Autocephalous church back in 1994, you weren't a Catholic back then, were you?

A. As I said, I consider myself to be a practicing Catholic.

Q. Father, up until the time that you were ordained in

1995, it would be accurate to state that you were a layperson; isn't that right?

A. I believe it is.

Q. Is there some question about that in your mind, Father?

A. No. I was a religious layperson living in a religious community which is something different than what you termed a layperson.

Q. Well, Father, it would be fair to say that in the Catholic church we have layfolks and we have religious and we have clerics; isn't that right?

A. That's correct.

Q. And in the Catholic church clerics consist of bishops, priests and deacons; isn't that correct?

A. That's correct.

Q. And you didn't fall within that category, did you?

A. Correct.

Q. And it's also fair to say that you were not a

[p.235]

religious because you did not have public sponsorship from the Cleveland Catholic Diocese or even the

Maronite as of July of the year 1994; isn't that correct?

A. That's correct.

Q. So, you did not have -- you did not have sponsorship as religious, you were certainly not a cleric, but the fact of the matter is you wanted to continue to wear a garb that, in fact, evidenced your status as a religious person who had that role; isn't that correct?

A. That's correct.

Q. Father, you would agree with me, would you not, as a Catholic, and let's go back to June of the year 1994 when I assumed you were a practicing Catholic, in June of the year 1994?

A. Yes.

Q. All right. So, June of the year 1994 you were a practicing Catholic; first of all, you would agree with me that a layperson such as yourself and such as myself can adhere to all the principles and tenets of the Catholic faith without ever putting on the habit or the tunic that you're wearing; isn't that correct?

A. I am sorry, I didn't follow your whole question,

[p.236]

please repeat it.

Q. Sure, I'm sorry, Father.

Let's go back to June of the year of 1994, after you lost sponsorship from Bishop Zayek, the Maronites, you have a status as a layperson, correct?

A. Correct.

Q. You have no formal religious status whatsoever, correct?

A. Correct.

Q. You have no Canonic status, do you?

A. Correct.

Q. Explain to the ladies and gentlemen on the jury what a Canonic status us.

A. The Roman Catholic church has a code of law that they adhere to which recognizes different aspects of life, much in the same way as two people who live together after seven years are, by "common law," married and that's my very liberal understanding of it.

The Catholic church would see, for instance, our community as doing what it professes to do as being a religious community and then after a period of time and after stability is shown would use Canon Law to recognize the community and that's

[p.237]

what Canon Law does, it recognizes realities that already are.

Q. But, Father, yours was non-Canonical status; is that correct?

A. That's correct.

Q. Canon law did not recognize you as having a religious status at all?

A. That's correct.

Q. Again, Father, again, as a layperson, such as myself, who is not a religious, not a cleric, the fact of the matter is, we have a full life of Catholic, adhere to all its religious tenets and beliefs and practices and fully live out the litrugy without ever wearing the habit that you are now wearing; is that correct?

A. Sure.

Q. We don't need that habit to fully practice the Catholic faith, do we?

A. That's correct.

Q. That habit is a trapping of religious life, is it not?

A. Yes, it is.

Q. Father, during this time, let's go back to 1994 when you're -- around the time that you're having

discussions with Father Hengle and you're living

[p.238]

out at Edwin Shaw and you're working out there; Father, can you tell us whether or not you were asking people to donate money to your order?

A. Sure.

Q. Okay. And you were trying to raise money for your order asking people in the community of Tallmadge to give your order money; is that right?

A. Sure.

Q. And, in fact, you asked for more than contributions; in fact, you asked people to make you loans so you could buy buildings out there, didn't you?

A. Yes, we did.

(Defendant's Exhibit B was marked for identification.)

By Mr. Reed:

Q. Father, first of all, showing you what has been marked as Defendant's Exhibit A, would you identify that for the ladies and gentlemen of the jury.

A. This is a copy of one of our newsletters. We called our newsletter The Mendicant.

Q. And mendicant means what, Father?

A. Beggar or person who asks for help from others in order to do what work they need to do.

Q. All right. And, Father, do you indicate in there

[p.239]

anything about your intention to return to the Roman Rite as of January of the year of 1994?

A. Yes, I do.

Q. And what did you say there in that letter that you distributed to the -- is that to the general populace?

A. To the people on our mailing list.

Q. All right. Father, what did you say in there about your intention to return to the Roman Rite as of January of the year 1994?

A. It says here, and I believe there is a misprint, "We have returned to the roman Rite."

Q. Father, there's a misprint, excuse me?

A. Yes, it's unfortunate, but it wasn't meant to be written that way.

Q. Father, what is the misprint that appears in The Mendicant?

A. It should have said we had returned to the practices. In other words, we were living under the Diocese of St. Mary and we were using the practices of the Maronite Church, the Eastern Rite, and that within our household we had collectively decided to return to the practices of the Roman Rite.

Q. Father, you also make reference in there, do you

[p.240]

not to the rupture of the relationship with Maronites?

A. Yes.

Q. And, in fact, they told you that your group of people, your community, was not growing, it wasn't expanding, it wasn't developing and it was no longer going to recognize that group; is that correct?

A. Correct.

Q. It told you not to dress as religious folks anymore, didn't they?

A. Correct.

Q. And, as a matter of fact, it was because this bishop, a second bishop, told you not to dress as religious that you cut off your ties with the Maronites and asked Bishop Pilla to be allowed to come back to the Roman Rite; isn't that correct?

A. That's correct, and we were asking for our rescripts, not for the community to be recognized by the bishop, but our individual rescripts to be returned to the rite of our heritage.

My family is Roman Catholic and Father Raphael's family is Roman Catholic and we were asking Bishop Pilla to please have the rescript written that would return us to the rite of our heritage, not for the community's approval or sanction.

Q. And, Father, it would be fair to say, wouldn't it, that that is when you asked for this rescript that Bishop Pilla became aware of the fact that your relationship with Maronites had ruptured, that it dissolved; is that correct?

A. Yes, I had written him a letter informing him of that.

Q. Thank you. And it was after that that he reminded you that you had no sponsorship from anybody and he asked you not to dress as religious, did he not?

A. Right.

Q. Showing you what's been marked as Defendant's Exhibit B, can you identify that for the folks on this jury.

A. I'm not sure, part of it has been blocked out by something in the copy.

Q. Okay. If you would, for the moment, address yourself

to the substance of what else is contained in that, can you identify that document?

A. I can see my signature. I can see that it's talking about property that we were trying to acquire as a result of our having to return two of our buildings to the Edwin Shaw Hospital.

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Q. And, Father, that was written in April of the year 1995?

A. And the date does say 4/19/95.

Q. At this time you were asking people to give you or loan you money, your community; is that right?

A. It states in the beginning, "We are not asking for a handout but for a loan. If you would like to make a deductible donation, this would be all right, too," yes.

Q. And, Father, did you say that you could very easily practice the faith without wearing the habit?

A. A Catholic could very easily.

Q. And, Father, you would agree with me that a Franciscan is a Catholic, wouldn't you?

A. Well, I would agree, but there are Anglican Franciscans. There are Lutheran Franciscans.

Q. That's because the Franciscans in a Catholic Church, they don't have a separate faith, do they? They are part of the Catholic faith and help them call out a rule --

A. That's right, but it's also that they are Anglicans and Lutherans.

Q. Father, you're not an Anglican Franciscan; is that correct?

A. That's correct.

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Q. Let's just focus on the time being Catholic Franciscans, Franciscan is not a separate religion, is it, it's not a separate religion from Catholic faith, is it?

A. No.

Q. And it never has been?

A. Yes, because there are Lutheran and --

Q. Let's just talk about Catholic Franciscans, they have never been a religious under themselves, they are all part of the Catholic faith; isn't that correct?

A. Correct.

MR. REED: Your Honor, if I could have just one moment. Thank you, Your Honor.

By Mr. Reed:

Q. Father, I'm curious, when you in April of the year 1995 were sending letters out, newsletters asking for loans and asking for contributions to your order, were you telling folks -- were you telling folks that you had a relationship with the Autocephalous Orthodox Church?

A. No, we did not tell them.

Q. Did it say anything about the Autocephalous Orthodox Church in that letter when you wrote to people asking them to give you money?

[p.244]

A. No, I didn't see that there was a need to.

Q. You know, Father, a lot of the people, a lot of the people that you were sending this letter to asking for money and asking for loans, were they people that you would run into at outings at Our Lady of Victory Parish?

A. Sure. They were people who had helped us in the past who knew us from the beginning of our relationship with the parish and who knew us a friends and supporters.

Q. That was a Catholic community out in Tallmadge?

A. Yes.

Q. And you didn't bother to tell them in April of the year 1995 when you were asking them for money that you had an affiliation now with the Autocephalous Orthodox Church, you didn't think that was important?

A. At the time it wasn't because we were planning to inform everyone collectively once we got settled with the group home movement relocation, et cetera, et cetera, which we did do, in fact.

Q. Father, would you agree with me that certainly Our Lady of Victory Parish Church, I think you've already testified to this, is a parish community with the Cleveland Catholic Diocese, is it not?

[p.245]

A. Correct.

Q. And, as a matter of fact, it is subject to the spiritual direction of the -- of the bishop of the Cleveland Catholic Diocese, namely Bishop Pilla; is that correct?

A. Yes.

Q. As a matter of fact, Father Hengle's appointment as pastor of that parish comes from Bishop Pilla; is that correct?

A. Correct.

Q. Father, it would be fair to say, would it not, that you

wouldn't agree to the requirements that you not wear that habit while doing your job at Our Lady of Victory Parish because of the fact that you didn't want Bishop Pilla telling you what to do; isn't that right?

A. If you would like to say it that way, yes.

Q. The answer is yes, isn't it, Father?

A. No because we wanted to be very much obedient to the bishop and we wanted to be sanctioned by the bishop and we wanted to show our loyalty and dedication to the Catholic church of his diocese and unfortunately we were given bad direction from some of the vicars for religious and the delegates that he appointed to deal with us and it was very

[p.246]

difficult to actually make that habit.

Q. Always somebody else's fault?

A. No, I didn't say that.

Q. Father, you said that you wanted to be obedient to the bishop?

A. Yes, we did.

Q. And the Bishop asked you not to wear the religious garb but that didn't meet with your wishes; is that correct?

A. That's correct.

MR. REED: No further questions, Your Honor. Thank you, Father.

THE WITNESS: You're welcome.

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REDIRECT EXAMINATION

By Mr. Dobbins:

Q. Father Gabriel, during this entire time period, '83 to '92, there were gaps in your sponsorship as an official sanctioned church by some official sanctioned church, was there not?

A. Yes.

Q. Was there any gap in your faith all along this time line?

A. No.

Q. Was there any gap in your purposes?

APPENDIX R

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

Dated April 12, 1996

GABRIEL M. WARD, Plaintiff,	) CASE NO. 94-10-3522
	) C. A. NO. 18234
	) Volume 2 (of 3)
vs.	) **TRANSCRIPT OF**
	) **PROCEEDINGS**
FATHER J. HENGLE, et al., Defendants.	)
	)
	)

APPEARANCES:

RICHARD DOBBINS and NICHOLAS SWYRYDENKO,
Attorneys at Law,
On Behalf of the Plaintiff.

ORVILLE REED,
Attorney at Law,
On Behalf of the Defendants.

- - -

BE IT REMEMBERED that upon the hearing of the above-entitled matter in the Court of Common Pleas, Summit County, Ohio, before the Honorable Michael T. Callahan,

Judge Presiding, commencing on April 12, 1996, the following proceedings were had, being a Transcript of Proceedings:

MAXINE A. HOSCH, RPR
Official Court Reporters
Summit County Courthouse
Akron, Ohio 44308

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has a motion on behalf of the Plaintiff.

THE COURT: Mr. Swyrydenko.

MR. SWYRYDENKO: Thank you, Your Honor.

We would move for directed verdict in favor of the Plaintiffs on the issue of liability for religious discrimination in employment.

We have admissions, clear admissions, from Father Hengle that he was fired solely because of his refusal to forsake the wearing of his habit, and we have uncontested testimony that that is part of his intense personally-held beliefs and there's been absolutely no attempt at any accommodation, no showing of any burden on the religious functioning of the church and, therefore, directed verdict should be entered on the issue of liability in this case.

THE COURT: Mr. Reed, you want to respond to that?

MR. REED: Well, I would, Your Honor.

First of all, I would assume it's going to be a jury issue if we get to that point as to whether or not this is a sincerely-held religious belief practiced by the Plaintiff. That's why we have a jury.

Secondly, Your Honor, we haven't had the

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opportunity to put our case on yet and, thirdly, the fact of the matter is there may be a situation where there can be no accommodation, where you have a direct conflict between a request from a bishop and a request from an employee who wants to work in a parish that is, in fact, governed by that bishop and there can be no accommodation, but as far as those other issues go, it's a question of fact as to whether or not this is a sincerely-held religious belief.

THE COURT: Motion for directed verdict on behalf of the Plaintiff is overruled. I do believe it is a jury question.

Mr. Reed.

MR. REED: Thank you, Your Honor.

Your Honor, at this time I would move for a directed verdict in favor of all of the Defendants on this ground: On the ground I believe that the exemption, exemption that is provided for under federal law, categorically requires this Court to direct a verdict in favor of the Defendants on the

grounds that they do have the right, they do have the right, to discriminate on the basis of religion because they are a religious institution, they are a religious organization, and this parish is about

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religion.

Long before there was a Bill of Rights, long before there was a Constitution, and long before there was America, even before there was a St. Francis, an unassuming on of an unassuming carpenter was asked to discuss the relationship between church and state.

And that person gave us wisdom for the ages when he said render unto Caesar what is Caesar's and with God the things that are God's and that wisdom, Your Honor, has been carried over into the Bill of Rights, specifically into the First Amendment.

And it gives to churches, it gives to religious institutions, absolute freedom without interference from the State in terms of how those institutions are going to be run.

Your Honor, I think that we tread into perilously, treacherous waters if we allow this Court to say that, in fact, the bishop can't say or this parish priest can't say whether or not this man who wants to express his own religious feelings, his own religious convictions, and I will assume for purposes of this motion that they are sincerely-held and that, in fact, they rise to the

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level of religion, assuming all that to be true, the parish priest and Bishop Pilla don't have to allow him to manifest his own expression of religion that is countermanded by the bishop in a parish.

There is nothing a bishop can do if this gentleman wants to wear this habit on Main Street, if he wants to wear it in his monastery, or in his church group or with his other brothers. There is absolutely nothing the bishop can do. He can't be sanctioned, he can't put him in jail, can't fine him, can't haul him down before Judge Callahan and ask for some sort of judicial intervention because it would interfere with his right to exercise his religion.

But this same man has no right to come into this parish, this Catholic parish, and, in fact, insist on being an employee on his conditions which are contrary to the conditions requested by the Bishop. Specifically, that he, in fact, cease wearing this religious garb in public.

Your Honor, I would draw the Court's attention -- I know there is some case law that the Court is already familiar with, and those cases and one in particular, Your Honor, I think deserves the

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Court's attention because this case is of constitutional magnitude, it has serious constitutional implications. And the case that I have referenced specifically is, of course, Amos, Supreme Court decision, only eight years old.

And also the case of Equal Employment Opportunity Commission, EEOC, versus Presbyterian Ministries, Inc. which is a 1992 decision.

Your Honor, in the Equal Employment Opportunity versus Presbyterian Ministries, Inc. which is a 1992 decision.

Your Honor, in the Equal Employment Opportunity versus Presbyterian Ministries, a woman was hired to work as a receptionist in a retirement community that was, in fact, run by the Presbyterian Church.

After she was hired -- and it was disclosed at that time that she was apparently not a Catholic, she was not a Presbyterian, she was something other than that -- she went to work there, she served in her role as a receptionist and she started wearing a Muslim head gear, Muslim headdress.

After some period of time the Presbyterians who ran that retirement home went to her and asked her to cease wearing that because it conflicted with their own notions about what was religious and what was appropriate and the impression that they

[p.360]

wanted to give as a Presbyterian institution.

In that case the Supreme Court said -- or excuse me, the Court said that, notwithstanding the fact that this woman may have a sincere religious belief, she has no right to exercise that religious belief in this setting. They have the right, under the exemption granted by the federal government,

to say no, you can't practice your religion in this religious setting. You can practice it and they can't interfere with your practice, but you have no right to impose your belief, your observances, your practices, upon the Presbyterian Church and, Your Honor, I would submit to the Court that that is precisely what is happening here.

That this gentleman has come to this parish setting under the auspices of the Cleveland Catholic Diocese and said basically "I want to carry out my practice of religion," whatever that might be, and perhaps it's not Orthodox Catholicism and it's not Orthodox Lutheranism. It's something only he knows something about. Perhaps it is the Autocephalus Orthodox Church, whatever he clings to, whatever he adheres to. That's fine, but he can't impose those practices on this church.

We have heard time in and time out that he

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is not a religious. He's admitted that. He stated that he has no formal canonical status. That, in fact, this robe that he wears gives the impression of having some formal status.

The Bishop has asked him not to wear it. The parish priest cognizant of the Bishop's request and cognizant of his role asked him not to wear it. He wouldn't do it. His contract was not renewed.

He has no right, Your Honor, to insist that he be allowed to wear this at this parish, Your Honor. We are not talking about General Electric. We are not talking about the

Babcock & Wilcox Company. We are not talking about Telxon. We are. Talking about a Catholic Church under the auspices of the Cleveland Catholic Diocese and, in fact, he has no right to come in here and say, "This is the way I want to dress. This is the way I want to live my life and you have to accept that." They don't. They don't. Their right is paramount to his.

They have no right to go into his place and say "You have got to live the way we want you to live," but he has no right to come there and say, "I'm going to do this job the way I want to do it in this garb and regardless of the impression that

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people have, this is what I want to do."

The exemption, Your Honor, has been broadly construed because, in fact, as the Supreme Court has indicated on numerous occasions, the wall that separates church and state should be impregnable and, Your Honor, I would submit to the Court that to allow this jury to decide that, regardless of what the Bishop thinks about canon law and regardless of what the Bishop thinks about what is or what isn't a formal religious entity, the fact of the matter is you are allowing this jury ultimately to say it doesn't matter what the Bishop of Cleveland says, if this man wants to work there, he can work there. He can work there and, Your Honor, that violates the fundamental principles that divide church and state in this country and those rights have been recognized ever since the Bill of Rights, Bill of Rights were enacted.

I would respectfully ask the Court to consider the constitutional implications of what is going on here.

We ask that we be allowed, that we be allowed to, in fact, practice our religion in these parishes as these people deem fit under the auspices of the Cleveland Catholic Diocese Bishop.

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The fact this man wants to do something different, Your Honor, is of no moment. They have the right to insist -- and if, in fact, that exemption were not present in the law, Your Honor, the entire federal law would be struck down as unconstitutional because the federal government can't go to a church and say you have got to hire somebody because, even though they are Protestant or Catholic or Presbyterian, whatever, those churches, whether they are Lutheran, Presbyterian or ordained Autocephalous Orthodox Church, Your Honor, those people have the right to dictate how they are going to be run and I would ask this Court to acknowledge, as a matter of law, the exemption does apply and that, in fact, there is no liability that may be imposed upon Father Hengle or the Diocese or the Cleveland Catholic Diocese or this parish for this alleged act of religious discrimination.

Thank you, Your Honor. Thank you for your patience.

THE COURT: Response on behalf of the plaintiff.

MR. SWYRYDENKO: I will try to be brief, Your

Honor.

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The issue raised by Mr. Reed is an issue that he raised on summary judgment. This Court has already ruled on that.

As far as fundamental principles and constitutional principles, one of the principles Mr. Reed seems to forget is that even these can be waived. They can be voluntarily waived. This Court is aware that virtually every day it has criminal defendants come in here and waive their constitutional rights and, in this case, I think we presented clear evidence that they have waived their rights, knowingly waived their rights, to this exemption by issuing and establishing a policy that has the effect of an order, according to their own witnesses, on everybody in the diocese that they are not to discriminate on the basis of religion.

That constitutes a waiver of that exemption under the federal act. That is not even a constitutional provision that is being invoked here, it's simply a federal statute, that provides them an exemption under federal law only.

Mr. Reed's argument basically is that the Catholic Diocese can proclaim publicly that it is an equal opportunity employer, can proclaim that we

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do not discriminate on the basis of religion and yet can hide behind this exemption. Basically he's stating that his clients are the largest organization of hypocrites on the face of the

earth and I think in this case waiver is clear.

Mr. Reed does not make any argument as to our state law claim and there is case law that I presented to the Court in our responses to his motion for summary judgment that says that that exemption under federal law does not apply to Ohio's state law.

And, therefore, is this Court is inclined to grant his motion for summary judgment it should apply only to the federal claim and not to the state claim which there is substantial case law stating that that is exempt from that exemption.

Thank you.

THE COURT: Thank you, Mr. Swyrydenko.

MR. REED: May I say just a couple words, Your Honor?

First of all, Your Honor, that exemption that is provided by federal law -- and I would assume based upon the argument just given by Mr. Swyrydenko, my able opponent, that they would agree, unless there has been a waiver, this Court

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should throw out the federal claims. There's been no argument that that exemption doesn't apply. It's a question of whether or not there is a waiver. Clearly, Your Honor, he has to concede that because if he doesn't, the First

Amendment means nothing.

But, Your Honor, but, Your Honor, Mr. Swyrydenko does argue that that only applies to federal law, it doesn't apply to Ohio law.

Your Honor, I would submit to you that there is case law that we cited to the Court already and in the past that suggests that the interpretation and losses and determinations made by federal judges and courts concerning federal law are equally applicable to how the Ohio Civil Rights Act is to be construed and, Your Honor, as the federal courts have pointed out, that exemption that I have talked about here to some length this morning has to be there. It has to be there. Otherwise the constitutional framework is shot.

They have to guarantee First Amendment freedom and rights to this church, to the Catholic Church, and, Your Honor, so we have to engraft that same exemption under the Ohio law or the Ohio law is unconstitutional as well because unless that is

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engrafted on, and that's what the federal courts have done, that's what the Ohio court and Sixth Circuit has said has to be done, the Ohio law has to be treated just like federal law.

Unless that exemption is grafted on, Your Honor, that entire framework is unconstitutional.

Finally, Your Honor, in terms of what the waiver is, we say, as Mr. Swyrydenko has pointed out, that we are an

equal opportunity employer. That does not say, Your Honor, that we have waived our right, our right, the supreme First Amendment right to our rights under the Constitution.

There is nowhere, Your Honor, in the evidence that has been offered is there anywhere that suggests that this right which is one of the paramount rights of the Constitution has been waived by this Church or by this Diocese or by this Bishop or by Father Hengle. That's just no there, Your Honor.

For this case, for this case to hold that there's been a waiver or to leave it to the jury to decide whether there has been a waiver of our First Amendment rights, Your Honor, is, to me, outrageous. There is no evidence here that we have. It can't happen.

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That would concede to the State, it would concede to the State, Your Honor, the right to dictate what goes on in terms of what we do in the Cleveland Catholic Church and in this parish and to direct the activities of Father Hengle and, Your Honor, I would submit that before that happens, there better be something more than a policy book saying we are an equal opportunity employer.

Your Honor, also the issue of waiver was specifically addressed, was specifically addressed in the case of EEOC versus Presbyterian Ministries where the woman, Jacqueline Brooks, argued that, in fact, there was a waiver because of the fact that they knew they were hiring someone who wasn't a Presbyterian, they knew what to expect, they waived their

right to exercise their religious rights and to be compelled to accept her religious rights and, Your Honor, the Court there said no, we are not talking about something that is so trivial that it can be waived by simply hiring somebody or, in this case, by making a policy statement.

We are talking about something that is so fundamental that it can't be waived. It can't be waived because to say that it is waived, Your Honor, means that you, it means that any court, it

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means that the legislature can deal with the hierarchy, the hiring, in the Cleveland Catholic Church. And, Your Honor, consider this, consider this. If Mr. Swyrydenko is right, that, indeed, there has been a waiver, Your Honor, I would submit to you that there will be litigation here before long that suggests that you should issue an opinion saying that women can be ordained in the Cleveland Catholic Church, the Catholic Disease.

If there's been a waiver, then I would submit to you that sex is not a factor and the Catholic Church has no right, has no right to say we are only going to ordain men as priests and, Your Honor, if you hold there is a waiver, they will be here asking you, asking you as an officer of this State, to determine that those women can be ordained and that they have all the rights and all the privileges and all the duties and obligations that any other ordained minister has in the Cleveland Catholic Church.

There's been no waiver, Your Honor. It's absurd.

This Court doesn't want that responsibility. It doesn't want that burden, and I would submit to the Court that logic and the law and what is the fundamental law of this country [p.370] require this Court to direct a verdict.

We are in perilous, treacherous waters, Your Honor. I would urge us not to go any further.

Thank you.

THE COURT: Thank you, Mr. Reed. Let me first say that, Mr. Reed, your impassioned and eloquent dissertation, speech, has not fallen on deaf ears. It also means that you don't have much preparation to do for your final argument.

MR. REED: I don't want to hear that.

THE COURT: Pardon me?

MR. REED: I don't want to hear that.

THE COURT: I understand that. The Court is faced with -- is in a position where it must follow its own words. Since I have been on the bench, I instruct jurors time and time again that they must put aside their own personal beliefs and their own personal biases and follow the law as I tell them it is. And the Court is in the position today where it must put aside its own personal beliefs and its own personal biases and follow the law as the Court sees that it is as it applies in this case.

That is my solemn oath and, therefore, I [p.371] believe that in viewing the evidence most favorable to the Plaintiff, which I must do in examining the motion for a directed verdict, I'm overruling the directed verdict. And we'll proceed this afternoon.

- - -

(Whereupon, the luncheon recess was had.)

- - -

APPENDIX S

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

Dated April 12, 1996

GABRIEL M. WARD,	) CASE NO. 94-10-3522
Plaintiff,	) C. A. NO. 18234
	) Volume 2 (of 3)
vs.	) **TRANSCRIPT OF**
	) **PROCEEDINGS**
FATHER J. HENGLE,	)
et al.,	)
Defendants.	)

APPEARANCES:

RICHARD DOBBINS and NICHOLAS SWYRYDENKO,
Attorneys at Law,
On Behalf of the Plaintiff.

ORVILLE REED,
Attorney at Law,
On Behalf of the Defendants.

- - -

BE IT REMEMBERED that upon the hearing of the above-entitled matter in the Court of Common Pleas, Summit County, Ohio, before the Honorable Michael T. Callahan,

Judge Presiding, commencing on April 12, 1996, the following proceedings were had, being a Transcript of Proceedings:

MAXINE A. HOSCH, RPR
Official Court Reporters
Summit County Courthouse
Akron, Ohio 44308

* * *

[p.420]

(Whereupon, the jury was excused.)

MR. REED: Your Honor, for the record, I would again indicate that the Defendants are prepared to rest subject to the admission of Exhibit A, which is a copy of The Mendicant identified by Father Ward: a copy of a letter dated 4/19/1995 signed by Brother Ward bearing the caption Brothers of the Annunciation of Mary; and Exhibit C which is a letter to John Hengle, Father John Hengle dated July 18, 1994 identified by Father Wiatrowski and a copy of the Diocesan Memorandum the bearing date of August 1994 marked as Defendant's Exhibit D which was also identified by Father Wiatrowski.

THE COURT: Any objection to A, B, C, or D?

MR. DOBBINS: Plaintiff has no objections.

THE COURT: All right. A, B, C, and D are admitted without objection.

MR. REED: Thank you, Your Honor. And, Your Honor, for the record I would like to renew the motion for directed verdict that I made this morning.

Your Honor, I appreciate what the Court is prepared to do, based on what I was advised this afternoon, I would like to say just one thing then I will sleep better tonight and that is, Your Honor, I think when we have reached a point -- I believe we have reached the point that witnesses are being cross-examined out of the Catholic catechism, the Court knows that it has crossed the road, it has breached what should be an impregnable wall between church and state, that we are into serious First Amendment problems, having said that, Your Honor, I would ask the Court to once again direct a verdict on the issue as stated by myself this morning.

THE COURT: Mr. Dobbins or Mr. Swyrydenko, you wish to respond?

MR. SWYRYDENKO: Your Honor, we'll rest on the argument that we presented the first time Mr. Reed presented his motion for directed verdict.

THE COURT: I, likewise, have some concerns, nevertheless that's why they have five people across the way that have jobs and I wouldn't want to cheat them out of an opportunity to have a case like this; therefore, the motion, for the reasons set forth earlier today, are overruled.

MR. REED: Thank you, Your Honor.

APPENDIX T

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

Filed September 5, 1996

BROTHER GABRIEL M. WARD, Plaintiff,	) CASE NO.) CV 94 10 3522)
vs.	) JUDGE MICHAEL) T. CALLAHAN
FATHER JOHN HENGLE, et al. Defendants.	))

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Pursuant to Civil Rule 50(B), Defendants, Father John Hengle, et al., respectfully move this court to set aside the judgment entered in favor of the Plaintiff, and enter judgment in favor of the Defendants. Construing the evidence in this case most favorably to the Plaintiff, these Defendants are entitled to judgment notwithstanding the verdict. The bases for this motion are set forth more fully in the attached memorandum in support.

Respectfully submitted,

Orville L. Reed, III (0023522)

Ward v. Hengle, et al. - No. CV 94 10 3522

Kenneth A. Calderone (0046860)
BUCKINGHAM, DOOLITTLE & BURROUGHS
50 South Main Street P.O. Box 1500
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Attorneys for Defendants

Certificate of Service

I certify that a true copy of Defendants' Motion for Judgment Notwithstanding the Verdict was sent via regular U.S. mail to Richard E. Dobbins, Attorney for Plaintiff, 3882 Bywood Drive, Akron, Ohio 44333 this 5 day of September, 1996.

_____

Orville L. Reed, III (0023522)
Kenneth A. Calderone (0046860)

BROTHER GABRIEL M. WARD, Plaintiff,	) CASE NO.) CV 94 10 3522)
vs.	) JUDGE MICHAEL) T. CALLAHAN
FATHER JOHN HENGLE, et al. Defendants.	))

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

FACTS

Because this Court presided over this trial, a lengthy recitation of the factual background is unnecessary. This action arises out of Defendants' alleged religious discrimination in the employment of Plaintiff. Over the last 15 Years, the Plaintiff has sought, on numerous occasions, to gain formal recognition from the Catholic Church of a religious community he calls the "Brothers of the Annunciation of Mary". Some time in 1980, the Plaintiff petitioned the Diocese of Youngstown to start this community; however, Plaintiff's request was denied. Again in January of 1980, the Plaintiff petitioned the Diocese of Cleveland to start his religious community. No official recognition was granted by the Diocese of Cleveland.

Since the Cleveland Diocese refused to recognize the Plaintiff's group as an official religious community, the Plaintiff decided to switch his allegiance from the Roman Rite to the Maronite Rite. After petitioning Bishop Zayek of the

Diocese of St. Maron in Brooklyn, New York, for official recognition for his religious community, the Plaintiff's community was granted an ad experimentum status in 1989. What prompted this petition to the Maronite Rite was the Cleveland Catholic Diocese's decision to no longer recognize the "Brothers of the Annunciation of Mary" as a public lay association. The Diocese would, however, according to Plaintiff, recognize the "Brothers" as a private lay association.

On December 31, 1993, the Diocese of St. Maron withdrew its sponsorship of the Brothers of the Annunciation of Mary because the community was not growing. As a result of the Diocese of St. Maron's withdrawal of its official recognition, the Plaintiff again sought to return to the Roman Rite. The Diocese of Cleveland has not recognized the Plaintiff's community and Plaintiff did not seek sponsorship of his community by the Cleveland Catholic Diocese.

Defendant, Father John Hengle ("Father Hengle"), has been the pastor of Our Lady of Victory Church in Tallmadge since July 1 of 1993. Our Lady of Victory is a Roman Catholic Church within the Diocese of Cleveland and is subject to Bishop of Cleveland. As pastor of Our Lady of Victory Church, Father Hengle answers directly to the Bishop of the Diocese of Cleveland, Anthony M. Pilla. When Father Hengle first became the pastor of Our Lady of Victory Church in 1993, the Plaintiff, Gabriel Ward, was already employed at Our Lady of Victory. The Plaintiff was responsible for bookkeeping, payroll and accounts payable.

After Father Hengle arrived at the church in July of 1993, he indicated to the staff members, including Plaintiff, that he would observe each of them for one year before he

took any actions with regard to their continued employment.

In June of 1994, Father Hengle met with the Plaintiff to discuss the renewal of the Plaintiff's employment contract. At that time, Father Hengle informed the Plaintiff that he was required to obey the directives of the Diocese of Cleveland.

Father Hengle made it clear to the Plaintiff that, as a condition of future employment with Our Lady of Victory Parish, he was not to wear his habit while working and could not insist upon being addressed as "Brother". These conditions were imposed because Plaintiff had no sponsorship to dress as a religious and it would have crated confusion in the parish to allow this man to be seen dressed in religious garb.

Subsequently, Father Hengle refused to enter into an employment contract with the Plaintiff as a result of Plaintiff's insistence on dressing in a religious habit and acting in a manner directly contradictory to the directives of the Bishop of the Cleveland Diocese.

Plaintiff now claims that he is the victim of religious discrimination because he, who is not the member of a sanctioned, religious community, is not permitted to wear a religious habit while working at Our Lady of Victory Parish. The jury returned a verdict in Plaintiff's favor on April 15, 1996 and judgment reflecting said verdict was filed on August 19, 1996.

LAW AND ARGUMENT

Ohio Civ. R. 50(B) states in pertinent part:

> Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion;... A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment...

A trial court ruling on a motion for judgment notwithstanding the verdict must use the same test applied in ruling on a motion for a directed verdict. That is, the evidence admitted at trial and the facts established by admission in the pleadings and in the record must be construed most strongly in the favor of the non-moving party. The court should not consider the weight of the evidence or the credibility of the witnesses. *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347; *Davis v. Cincinnati* (Summit Co. 1991), 81 Ohio App.3d 116, 121.

A. As a matter of law, this Court May Not Intervene In The Hierarchy Of The Roman Catholic Church Because the First Amendment Of The United States Constitution Prohibits Civil Courts From Adjudicating Controversies Over Religious Doctrine And Practice.

It is respectfully submitted, that this Court, no less a jury, has no basis to render an adverse judgment against the Defendants. A decision adverse to the Defendant would

materially alter the Defendant's interpretation and practice of traditional church doctrine. Respect for the free expression and exercise of religion is a fundamental tenet of U. S. Constitutional Law. In a decision that predates the First Amendment's application to the States through the Fourteenth Amendment, the United States Supreme Court held:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the law of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support to of no dogma, the establishment of no sect .... All who unite themselves to such a body [the church] do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, **that those decisions should be binding in all cases of the ecclesiastical cognizance, subject only to such appeals as the organism itself provides for**.

Watson v. Jones (13 Wall. 1871), 80 U.S. 679, 728-29. (Emphasis added).

The rule elicited in Watson, supra, was established into a constitutional principle of law in Kedroff v. St.

Nicholas Cathedral (1952), 344 U.S. 94 in which the court observed:

> The opinion [in Watson v. Jones] radiates.., a spirit of freedom for religious organizations, and independence from secular control of manipulation--in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

Id. at 116; see also, Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church (1969), 393 U.S. 440.

In Serbian Orthodox Church v. Kelemen (1970), 21 Ohio St.2d 154, the Ohio Supreme Court was forced to determine a property dispute between two ecclesiastical bodies in light of the Supreme Court of the United States' decision in Presbyterian Church, supra. Applying the First Amendment Establishment Clause principles enunciated in Presbyterian Church, the Ohio Supreme Court observed:

> While we recognize that these matters of internal church organization are chronic sources of disagreement for the parties and are frequently mentioned in the pleadings, briefs and arguments, the findings of the Court of Appeals are unnecessary and immaterial to a *neutral* law inquiry utilizing principles of law developed for use in *all* property disputes. Further, the *Hull Memorial* case offers the strong suggestion that civil courts cannot constitutionally determine matters of church government.

Id. at 159.

A judgment adverse to Defendants, as a matter of law, cannot stand. A Civil Court cannot alter church practice and doctrine based on these circumstances. The Bishop of the Diocese of Cleveland has the authority, and not this Court, to issue directives regarding matters of dress in matters such as this. It is the Roman Catholic Church which has religious authority over such matters, and not this Court. Such was the case in Dragelevich v. Ragasich (1970), 24 Ohio App.2d 59 where the Court of Appeals for Mahoning County held:

> 1. The First Amendment to the United States Constitution prohibits civil courts from adjudication of controversies over religious doctrine and practice.
>
> 2. Religious organizations have the power to decide matters of church government for themselves, free from state interference ....
>
> 3. In the absence of fraud, collusion, or arbitrariness, the decisions of proper church tribunals on matters purely ecclesiastical, such as the appointment of a clergyman, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.

Id. at ¶¶1-3 of the syllabus.

The First Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment, prevents this Court from usurping the religious authority of the Bishop of the Cleveland Catholic Diocese. This Court has no authority to sanction Plaintiff's goal of imposing his interpretation of religious scriptures on the hierarchy of the

Roman Catholic Church. Accordingly, this Court must, as a matter of constitutional mandate, enter a judgment in favor of these Defendants.

B. As A Matter Of Law Plaintiff Has Not Been Discriminated Against On The Basis Of Religion.

1. Federal Law Must Be Applied In Adjudicating Plaintiff's State Law Claim.

In Ohio, there is very little case law construing R.C. §4112.02(A). See e.g., Southwind Motel v. Ohio Civil Rights Commission (Franklin County 1985), 24 Ohio App.3d 209. The Sixth Circuit Court of Appeals and Ohio State Courts, have construed 42 U.S.C. §2000, et seq. when applying claims under R. C. 4112.02(A). Ohio courts have long held that federal case law construing 42 U.S.C. §2000, et seq. applies to actions brought under R.C. §4112, et seq.See Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission (1981), 66 Ohio St.2d 192, 196.

In Plumbers the Ohio Supreme Court held, in interpreting a state discrimination claim, that:

> In previous cases .... we have determined that federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq .... is generally applicable to cases involving alleged violations of R. C. Chapter 4112. Republic Steel of Ohio Civil Rights Commission (1973), 44 Ohio St. 2d 179 ....

Id. at 196.

Ohio Courts have not retreated from the rule set forth in Plumber. Ohio Courts have made it clear that when interpreting Ohio Law dealing with alleged discrimination, Title VII of the Civil Rights Act of 1964 is applicable. Little Forest Med. Ctr. of Akron v. Ohio Civ. Rights Comm. (1991), 61 Ohio St. 3d. 607, 610; Frank v. Toledo Hospital (1992) 84 Ohio App. 3d 610, 612.

2. Under Federal Law, Plaintiff Has Failed To Establish A Prima Facie Case Of Religious Discrimination.

In Cooper v. Oak Rubber Company, (6th Cir. 1994), 15 F.3d 1375, the Sixth Circuit Court of Appeals explained the elements of a prima facie case of religious discrimination:

> The employee bears the burden of establishing a prima facie case, and sustains that burden by showing that he holds a sincere religious belief that conflicts with an employment requirement; that he has informed his employer of the conflict; and that he was discharged or disciplined for failing to comply with the conflicting requirement. Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987) .... Once a prima facie case is established, the burden shifts to the employer to show that it could not reasonably accommodate the employee without undue hardship. The reasonableness of an employer's attempt to accommodate is determined on a case-by-case basis. If the employer's efforts fail to eliminate the employee's religious conflict, the burden remains on the employer to establish that it is unable to reasonably accommodate the employee's beliefs without incurring

> undue hardship. Id. To require an employer to bear more than a de minimis cost in order to accommodate an employee's religious beliefs is an undue hardship. TransWorld Airlines, Inc. v. Hardison, 432 U.S. 63, 84... (1977). (emphasis added)

Id. at 1378; see also, Equal Employment Opportunity Commission v. Arlington Transit Mix, Inc. (6th Cir. 1991), 957 F.2d 219.

3. Plaintiff Has Failed To Demonstrate, As A Matter Of Law, That His Personal Preference To Wear His Garb Is A "Sincere Religious Belief".

In the instant case, the Plaintiff totally failed to carry his burden to establish a prima facie case of religious discrimination. In point of fact, the Plaintiff failed to establish that. he holds a "sincere religious belief that conflicts with an employment requirement... . " Id. The Plaintiff wants the freedom to wear religious garb (a habit) to his job at Our Lady of Victory Church. The Plaintiff admits that his garb, a religious robe, is a symbol of a formal, religious status. However, Plaintiff has **no formal,** religious status within the Catholic church. Even more telling, however, is the patent admission of the Plaintiff that the wearing of his habit is **not an article of faith for him** What is at issue in this case is not a "sincere religious belief"; rather, what is involved is the Plaintiff's view of authority within the Catholic church and his own personal opinion. Thus, Plaintiff's wearing of the habit is **not an article of faith** for him. Even if the Plaintiff claimed that as a Franciscan he was required to wear certain garb, he is incorrect. Given the admissions of the Plaintiff it

is clear that the Plaintiff's claim does not involve a religious tenet or belief. It involves Plaintiff's preference to dress in a particular way which, in the opinion of the Bishop of the Cleveland Catholic Diocese, is misleading to the members of the church community of Our Lady of Victory.

The Plaintiff's preference to wear religious garb while at work does not rise to the level of a "religious belief" for the purposes of R.C. §4112.02(A). The United States Supreme Court has enunciated a test to determine whether an individual's beliefs are "religious". See United States v. Seeger (1965), 380 U.S. 163. The Court's definition is instructive:

> A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.

Id. at 176.

Plaintiff's preference to wear religious garb while at work also does not rise to the level of **religious practice** as defined by the Code of Federal Regulations:

> ...[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.

29 C.F.R. ¶1605.1

The Fifth Circuit Court of Appeals has also identified three major factors which enter into a determination of

whether a belief is "religious":

> The "religious" nature of a belief depends on (1) whether the belief is based on a theory of 'man's nature or his place in the universe', (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is sincere.

Brown v. Dade Christian Schools, Inc. (5th Cir. 1977), 556 F.2d 310, 324 (dissent) (citations omitted), cert. denied (1978), 434 U.S. 1063.

Furthermore, the United States Supreme Court has characterized a "religious belief or practice" as "...**not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.**" Wisconsin v. Yoder (1971), 406 U.S. 205, 215-16. (Emphasis added); see also, Brown v. Pena (5th Cir. 1978), 589 F.2d 143.

4. Assuming Arguendo, The Plaintiff Has Established A Prima Facie Case, As A Matter Of Law, The Defendant Has Demonstrated That Accommodating Plaintiff's Particular Religious Expression Would Constitute Substantial Harm.

At trial there was ample evidence to demonstrate that the Plaintiff's particular expression of his self-proclaimed religious' beliefs is fundamentally inconsistent with the Defendants. Likewise, there was ample evidence presented by the Defendant that requiring the Plaintiff to continue to work as an employee of the Defendant under the present

circumstances would cause substantial hardship. Case law interpreting the kind of reasonable accommodations an employer must make for an employee's religious beliefs has consistently rejected the imposition of undue hardship. TWA v. Hardison, 432 U.S. 63 (1977); McDaniels v. Essex International, Inc., 571 F. 2d 338 (Sixth Cir. 1978).; Settles v. Wicks Labor Division, unpublished, 624 F. 2d 1101 (Sixth Cir. 1980) (attached). As a matter of law, any accommodation which is more than de minimis for an employer, is unreasonable. See, Settles attached. In Smith v. Pyro Mining Co., 827 F. 2d 1081 (Sixth Cir. 1987), the court found undue hardship placed upon an employer for switching days for an employee based upon the employee's religious beliefs. Likewise, in Reed v. Memphis Publishing Co. 521 F. 2d 512 (Sixth Cir. 1975), the court stated:

> The clear language of the statute does not indicate that Congress has ever intended to coerce employees into accommodating all the religious practices of their employees or prospective employees.

Id. at 519.

The court in Reed found the accommodation requested by the employee unreasonable because it imposed an undue hardship on the employer. Therefore, the employee's claim was rejected. Id. at 520.

Therefore, in the instant matter, as a matter of law, assuming arguendo, the Plaintiff has established a prima facie case, the accommodation Plaintiff requests would be patently unreasonable and impose an undue hardship. Therefore, on this basis alone, Plaintiff's claims must be dismissed.

C. Federal Law Has Codified First Amendment Protections By Exempting Religious Groups From Title VII Prohibition.

42 U.S.C. §2000e-2(a) provides that it is an unlawful employment practice for an employer:

> (1) To fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or natural origin ....

Id.

Notwithstanding this broad, statutory prohibition, Congress acted to exempt religious groups from Title VII prohibitions:

> This Title shall not apply to an employer with respect to... a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. §2000e-1.

In the instant case, it cannot be disputed that the Defendants fit within the exemption provided in Title VII §2000e-1. The Plaintiff argued that he was a "secular"

employee of Our Lady of Victory Church; however, this distinction is without a difference under 42 U.S.C. §2000e-1. Courts consistently apply the express exemption when employment decisions by religious employers materially affects matters of Church authority.

In Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos (1987), 483 U.S. 327, the Supreme Court of the United States held that applying the religious exemption to Title VII's prohibition against religious discrimination in employment to secular, non-profit activities of religious organizations did not violate the establishment clause. In that case, the Mormon church hired an individual to work at a gymnasium. The gymnasium was a non-profit facility of the Mormon church. In 1981, the employee, an assistant building engineer, was discharged because he failed to qualify for a temple recommend, a certificate that he is a member of the Church and eligible to attend its temples. Id. at 330. The lower courts held that applying the "religious organizations" exemption of 42 U.S.C. §2000e-1 violated the Establishment Clause of the First Amendment of the United States Constitution. The Supreme Court disagreed and held:

> ...[A]s applied to the non-profit activities of religious employers, §702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions.
>
> It cannot be seriously contended that §702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and

> avoids the kind of intrusive inquiry into religious belief that the District Court engaged in this case.

Id. at p. 339.

The reasoning behind the Supreme Court's decision in Amos, supra, is instructive:

> ...[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might effect the way an organization carried out what it understand to be its religious mission.
>
> After a detailed examination of the legislative history of the 1972 amendment, the District Court concluded that Congress' purpose was to minimize governmental 'interfer[ence] with the decision-making process in religions.' 592 F.Supp., at 812. We agree with the District Court that this purpose does not violate the Establishment Clause.

Id. at 335-336.

Like the instant case, the exemption has been applied to an employee's attire, worn for purported religious purposes. In granting summary judgment for the Defendant/employer, the court in Equal Employment Opportunity Commission v. Presbyterian Ministries, Inc.

(W.D. Washington 1992), 788 F.Supp. 1154, held that:

> Title VII may not be construed to force a religious institution to countenance the display of religious symbols contrary to the image and environment that the institution wishes to create and maintain. To protect Plaintiff's exercise of her religion on the premises of PMI's Exeter House, would be to favor her religious exercise over PMI's on PMI's own premises and to impermissibly interfere with PMI's operation of Exeter House. PMI justifiably considered Plaintiff's display of her own religious preference at the highly visible reception desk all the more inappropriate from its point of view. (pp. 1157, 1158)

In Equal Employment Opportunity Commission, supra, the Plaintiff, Jacqueline Brooks, worked as a receptionist at a retirement home operated by Presbyterian Ministries, Inc. Presbyterian Ministries (hereinafter referred to as "PMI") objected to the head coverings that Ms. Brooks chose to wear as required by her Muslim faith. After being told many times not to wear her head covering, and failing to abide by PMI's directives, Ms. Brooks resigned. The Presbyterian Ministries Court held:

> Section 702 [former equivalent of 42 U.S.C. §2000e-I] is an exemption that applies to PMI under the circumstances of this case. It can not be seriously disputed the Christian nature of Exeter House was obvious from the most cursory view even before the modifications of the personnel manual .... Merely because PMI did not actively inquire to Plaintiff's religion does not provide a mechanism for an

> employee to subsequently begin to assert a non-Christian religious belief in such a manner deemed inappropriate by PMI. Such a limited interpretation of the exemption would result in intolerable intrusions into the operation of a religious entity's own agencies.
>
> Certainly, PMI may determine for itself what environment it seeks to provide in its agencies such as Exeter House. The employees' actions, attitudes, and appearances are obviously an important element in creating that environment. The receptionist position is important in conveying an initial first impression, and Exeter House must be free to determine the impression it wishes to convey; the receptionist may not dictate to' PMI in this regard. Plaintiff is free to exercise her religion, but she may not do so on PMI premises in a way that PMI deems is contrary to its interests.

Id. at 1156.

Similarly, in Little v. St. Mary Magdalene Parish (3rd Cir. 1990), 929 F.2d 944, a non-Catholic elementary school teacher's contract was not renewed because she failed to obtain an annulment of her first marriage before remarrying. The school teacher brought a complaint pursuant to 42 U.S.C. §2000e-2. The trial court granted summary judgment on Plaintiff's Title VII claim and that order was affirmed by the Circuit Court. The court held that the religious organization exemption of 42 U.S.C. §2000e-1 applied and noted:

> Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption

> broadly. We conclude that the permission to employ persons "of a particular religion" includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts. Thus, it does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles.

Little v. St. Mary Magdalene Parish (3rd Cir. 1990), 929, F.2d 944, 951.

In the case at bar, Father Hengle clearly stated that it was necessary for him to enforce the directives of the Bishop of the Diocese of Cleveland regarding the Brothers of the Annunciation of Mary. It was the decision of the Bishop of the Diocese of Cleveland not to allow the Plaintiff to wear his habit and use an official title (ie., Brother) because the "Brothers of the Annunciation of Mary" is not a canonically recognized order. Father Hengle could not have allowed Plaintiff to wear his habit religious habit and be addressed by the term "Brother" without contradicting the direction of the Bishop.

Because the Defendants are clearly within "religious organizations exemption" of 42 U.S.C. 2000e-l, this Court should grant Defendants' Judgment notwithstanding the jury verdict.

D. Defendants Never "Waived" Their First Amendment Right To Freedom Of Religion.

Courts have required any waiver of important

Constitutional rights must be knowing and intelligent and consents to their violation must be strictly construed. E.E.O.C.v. Southwest Baptist, 485 F.Supp. 233, 262. In Southwest, the court rejected the argument that a religious organization "waives" an important' Constitutional protection merely by receiving government aid which contained certain restrictions. Id. at 262.

In Little v. St. Mary Magdalene Parish (6th Cir. 1990), 929 F.2d 944, the court also rejected a "waiver" argument by stating:

> Little argues that even if the Parish's decision is exempted from Title VII. the Parish waived those exemptions when it knowingly hired a Protestant. This argument incorrectly views the exemptions for religious schools as a privilege or interest granted to those organizations, n7 Instead, those exemptions reflect a decision by Congress that the government interest in eliminating religious discrimination by religious organizations is outweighed by the rights of those organizations to be free from government intervention. (Emphasis added)

Id. at 950-951.

At trial, there simply was no evidence that the Defendants ever "waived" their First Amendment Rights.

E. Plaintiffs Failure To Exhaust Administrative Remedies Is An Absolute Bar To His State And Federal Claims.

It is an elementary prerequisite in employment discrimination litigation that a party must exhaust his administrative remedies prior to suit. Haithcock v. Frank (6th Cir. 1992), 958 F.2d 671,675. Without dispute, the Plaintiff failed to file any claims in the EEOC or OCRC. Therefore, each of these claims must be dismissed. Plaintiff's reliance on Elek v. Huntington Bank is clearly misplaced. Elek only applies to state actions brought under R.C. 4112.99, not R.C. 4112.02(n) action claimed by the Plaintiff.

F. Plaintiff's Presented No Evidence At Trial Supporting A Claim For Punitive Damages.

Title VII of the Civil Rights Act, §102(b)(1) and (2), 42 U.S.C. §2000-5, provides that a prevailing party may recover punitive damages only where "the respondent [i.e. employer] engaged in a discriminatory practice with malice." This means the Plaintiff bears the burden of proving the Defendants acted with an evil intent or a reckless indifference to the federally protected rights of the Plaintiff. *Smith v. Wade* (1983), 461 U.S. 30, 56; *Dombeck v. Milwaukee Valve Co.* (W.D. Wes. 1993), 823 F. Supp. 1475, 1480.

> The purpose of awarding punitive damages is to "punish a wrongdoer for his outrageous conduct and to deter others from engaging in similar conduct." *Id.* Such an award must be supported by the record, and may not constitute merely a windfall for the plaintiff, *Id.; Rodgers v. General Motors Corp.*, 739 F.2d 1102, 1109 (6th Cir. 1984), *cert. denied,* -U.S.-, 105 S. Ct. 1759, 84 L. Ed.2d 821 (1985); *McKinley v. Trattles,* 732 F.2d 1320, 1327 (7th Cir. 1984).

Yarbrough v. Tower Oldsmobile, Inc. (7th Cir. 1986), 789 F.2d 508, 514.

In the case at bar, the Plaintiff admitted that wearing his habit is/was not an article of faith for him. The Plaintiff's preference to wear religious garb has nothing to do with his religious practice or beliefs. Therefore, Defendant's conduct in this case did not interfere with either his ability to practice his faith, religious conviction, tenement or belief of his faith. There simply was absolutely no evidence present at trial that the Defendants intentionally injured, abused, or acted with reckless indifference to the Plaintiff's right to practice his faith. Absent any such evidence, judgment must be entered in favor of the Defendants on Plaintiff's punitive damage claim.

G. The Plaintiff Did Not Present Evidence At Trial Supporting The Jury's Award For Compensatory Damages.

42 U.S.C. §2000(e)-5(g)(1) provides the remedies a party may pursue in an employment discrimination case:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable

> relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or person discriminated against shall operate to reduce the back pay otherwise allowable. (Emphasis added).

The underlying purpose of a back pay is to place the discrimination victim in a position he/she would have been in had the discrimination not occurred." *E.E.O.C.v. Ford Motor Co.*(1981), 645 F.2d 183, 185; *Comacho v. Colorado Electric Technical College, Inc.* (1979), 590 F.2d 887, 889.

In contrast, O.R.C. 4112.99 broadly provides:

> Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

A Plaintiff pursuing relief under O.R.C. 4112.99 may recover "civil damages" for back pay, intentional infliction of emotional distress, punitive damages, etc., *Crihfield v. Monsanto Co.* (S.D. Ohio 1944), 844 F. Supp. 371,372.

In the case at bar, the Plaintiff only presented evidence of his lost wages as damages at trial. Plaintiff presented absolutely no evidence supporting an award for other damages.

Remarkably, the jury awarded Plaintiff $5,300 for

"compensatory damages or losses in addition to his salary."[1]

Absent evidence of such damages, the Defendants move this court to enter a judgment, notwithstanding the jury's verdict, in favor of the Defendants on Plaintiff's claims for compensatory damages above and beyond the Plaintiff's salary. The only damages that Plaintiff properly supported with evidence are Plaintiff's claim for back pay and/or lost wages totaling $10,700.

Respectfully submitted,

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[1] See Jury Interrogatories attached hereto as Exhibit A.

Ward v. Hengle, et al. - No. CV 94 10 3522

Certificate of Service

I certify that a true copy of the foregoing was sent via regular U.S. mail to Richard E. Dobbins, Attorney for Plaintiff, 3882 Bywood Drive, Akron, Ohio 44333 this __ day of September, 1996.

_____

Orville L. Reed, III (0023522)
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APPENDIX U

IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO

Filed March 6, 1997

BROTHER GABRIEL WARD, Plaintiff/Appellee	) C.A. NO. 18234)
vs.	) APPEAL FROM) COURT OF) COMMON PLEAS
FATHER JOHN HENGLE, et al. Defendants/Appellants.	) SUMMIT COUNTY) CASE NO.) CV 94 10 3522

/

BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

I. The Trial Court erred to the prejudice of Appellants by failing to grant Defendants/Appellants Motion for Summary Judgment. (Order filed August 16, 1995, attached at A-6; see also, pleadings of the parties, attached as A-2, A-3, A-4, A-5).

A. The Trial Court violated the First Amendment to the Constitution of the United States which prohibits Civil Courts from adjudicating controversies over religious doctrine and practice.

B. The Trial Court erred when it exercised jurisdiction, because the Catholic Church is exempt from Title VII prohibitions.

C. Even if the Trial Court could have constitutionally exercised jurisdiction in this case the Plaintiff/Appellee failed to establish a *prima facie* case of religious discrimination.

D. Plaintiff/Appe!lee's claim of religious discrimination is prohibited because the Plaintiff
failed to exhaust his administrative remedies.

II. The Trial Court erred to the prejudice of Appellants by denying Defendants/Appellants' Motion for Directed Verdict made at the close of Plaintiff's case-in-chief by determining that a jury issue was presented on "Waiver." (Transcript of Proceedings, Volume 2, at pp. 355-371).

III. The Trial Court erred and violated Defendants/Appellants' freedom of religion guaranteed by the First Amendment to the Constitution of the United States when it failed to grant Defendants/Appellants' Motion for a Directed Verdict made at the close of all evidence. (Transcript of Proceedings, Volume 2, at pp. 420-421).

IV. The Trial Court erred to the prejudice of Appellants by denying the Defendants/Appellants Motion for Judgment Notwithstanding the Verdict. (Judgment Entry flied Nov. 13, 1996, attached at A-10; see also

Defendants' Motion and Memorandum in Support, Attached at A-9).

A. As a matter of law, the Defendants have demonstrated that accommodating Plaintiff's particular religious expression would constitute substantial harm.

B. The Plaintiff did not present evidence at trial supporting a claim for compensatory damages in excess of lost wages. (See also, Transcript of Proceedings, Volume 3, at pp. 479-481, Verdict, attached at A-7).

C. The Plaintiff did not present evidence at trial supporting a claim for punitive damages. (See also, Transcript of Proceedings, Volume 3, at pp. 481-482, Verdict attached at A-7).

V. The Trial Court erred when it conducted voir dire which systematically excluded persons of the Roman Catholic Faith from the jury and violated: Defendants/Appellants' right to a jury trial guaranteed by the Ohio Constitution Article I, Section 5, and the Seventh Amendment to the Constitution of the United States; and Defendants/Appellants' rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. (Transcript of Proceedings, Volume 1, at pp. 68, 91-135).

ISSUES PRESENTED FOR REVIEW

I. Did the Trial Court violate the Free Exercise clause of the First Amendment to the Constitution of the United States by impermissibly adjudicating a controversy concerning religious doctrine and practice. (Assignment of Error I.A.).

II. Did the Trial Court have jurisdiction to decide Plaintiff/Appellee's claim of religious discrimination despite the Defendants/Appellants' exemption under Title VII. (Assignment of Error I.B.).

III. Did the Plaintiff/Appellee establish a Prima Facie case of religious discrimination. (Assignment of Error I.C.).

IV. Did the Trial Court err by proceeding on Plaintiff/Appellee's claim of religious discrimination despite Plaintiff's failure to pursue any administrative remedies. (Assignment of Error I.D.).

V. Did the Trial Court err by determining that a jury issue of"Waiver" was presented, and does the equitable theory of Waiver even apply to a Title VII claim of religious discrimination, or to the First Amendment rights of a religious organization, in an action for religious discrimination against a religious organization. (Assignment of Error II.).

VI. Did the Trial Court violate the Defendants/Appellants' First Amendment Freedom of Religion guarantees by burdening Defendants' exercise of religion and

impermissibly entangling the state in the governance of the Cleveland Catholic Diocese. (Assignment of Error III.).

VII. Would accommodating Plaintiffs wish to wear a habit at Our Lady of Victory Catholic Church constitute substantial harm to Defendants. (Assignment of Error IV.A.).

VIII. Did the Plaintiff present evidence at trial to support the jury award for compensatory damages. (Assignment of Error IV.B.).

IX. Did the Plaintiff present evidence at trial to support a the jury award for punitive damages. (Assignment of Error IV.C.).

X. Did the Trial Court violate the Defendant/Appellants right to a jury trial and equal protection of the law as guaranteed by the Ohio Constitution Article I, Section 5, and the Seventh and Fourteenth Amendments to the Constitution of the United States by conducting a separate Voir Dire of Catholic members of the jury venire which systematically excluded persons of the Roman Catholic faith from the jury. (Assignment of Error V.).

XI. Did the Trial Court err when it issued Jury Instructions on waiver, and on compensatory and punitive damages, for which the Plaintiff/Appellee provided no evidence in his case in chief. (Assignments of Error V, VIII, IX.).

[x]

STATEMENT OF THE CASE

This action arises from the decision by the Defendant, Our Lady of Victory Catholic Church, not to continue the employment of the Plaintiff. This Catholic parish located in Tallmadge, Ohio took this action because Plaintiff refused to cease wearing a religious habit (consisting of a tunic, capuche, cord and rosary) which is the symbol and garb of a "Religious," that is, a member of a Monastic Order. While Mr. Ward had sought to establish a Monastic Order sanctioned by the Catholic Church, for the 15 years from 1979 to 1994, he was never able to meet the criteria required by Cannon Law, the law of the Catholic Church, to establish such an order. Although he and his followers intimate they adhere to the Rule of the Franciscan Order, they are not Franciscans, and in fact do not belong to any religious order recognized by the Catholic Church.

In June of 1994, a simple and limited condition was placed on Plaintiff's continued employment at Our Lady of Victory Roman Catholic Church: while Mr. Ward worked at that parish of the Cleveland Diocese he could not wear a religious habit. Plaintiff claims that because the Defendants refused to employ him because of his insistence on wearing a religious habit they discriminated against him on the basis of his religion.[1] Plaintiff filed this suit against Defendants alleging religious discrimination in employment.

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[1] See Complaint, attached hereto as Appendix A-1.

On May 30 1995 the Defendants moved for Summary Judgment.[2] On June 26, 1995, Plaintiffs also moved for Summary Judgment as part of their response to Defendants' Motion.[3]

[1]

The parties also filed reply memoranda.[4] The Court below denied Summary Judgment on August 16, 1995.[5]

This case proceeded to jury trial on April 10, 1996. At the close of Plaintiffs case-in-chief both the Plaintiff and the Defendants moved for directed verdict. (See Transcript of Proceeding. Volume 2, hereinafter referred to as Tr. of Pr., Vol. 2, at pp. 355-37.1). After the Defendants completed their case-in-chief, they renewed their motion for directed verdict. (Id. at pp. 420-421). On April 15, 1996 the jury returned a verdict in favor of the Plaintiff, Gabriel M. Ward, finding damages in addition to Plaintiffs salary and awarding

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[2] See Defendants', Father John Hengle, et al., Motion for Summary Judgment, attached hereto as Appendix A-2.

[3] See Plaintiff's Response to Defendants' Motion for Summary Judgment; and Plaintiff's Motion for Summary Judgment, attached hereto as Appendix A-3.

[4] See Reply Brief of Defendants, attached hereto as Appendix A-4; and Reply of Plaintiff, attached hereto as Appendix A-5.

[5] See Order, attached here to as AppendixA-6.

punitive damages.[6] A final judgment was not immediately entered because the issue of the amount of Plaintiff s attorney fees to be awarded yet pended.

On August 29, 1996 the Trial Court ruled on attorney fees for the Plaintiff.[7] On September 5, 1996 Defendants moved for Judgment Notwithstanding the Verdict.[8] The Trial Court denied Defendants' Motion for Judgment Notwithstanding the Verdict on November 13, 1996.[9]

The Defendants timely filed their Notice of Appeal with the Court on December 3, 1996.[10]

[2]

STATEMENT OF FACTS

This action arises out of Defendants' alleged religious discrimination in the employment of Plaintiff. Over a course

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[6] See Verdict, attached hereto as Appendix A-7 (including Jury Interrogatories).

[7] See Judgment Entry, attached hereto as Appendix A-8.

[8] See Defendants' Motion for Judgment Notwithstanding the Verdict, and Memorandum in Support attached hereto as Appendix A-9.

[9] See Judgment Entry, attached hereto as Appendix A-10.

[10] See Notice of Appeal, attached hereto as Appendix A-I 1.

of 15 years, the Plaintiff sought, on numerous occasions, to gain formal recognition from the Catholic Church of a religious community he calls the "Brothers of the Annunciation of Mary." Some time in 1979, the Plaintiff petitioned the Diocese of Youngstown to start this community; however, Plaintiffs request was denied. (Tr. of Pt., Vol. 1, at p. 165). Yet in January of 1980, the Plaintiff petitioned the Diocese of Cleveland to start his religious community.

The Cleveland Diocese granted sponsorship to the "Brothers" as a union of lay persons, an experimental status for a possible religious community. (Id. at pp. 169-170, Vol. 2 at p. 279). This status allowed the Plaintiff to wear a habit "internally", but not in public. (Id., Vol. 1 at pp. 173-174, 224-225). However, the community envisioned by the Plaintiff never grew and the Diocese withdrew its sponsorship, and the right to wear religious garb within the Diocese. (Id., Vol. 2 at pp. 336-339).

Since the Cleveland Diocese refused to recognize the Plaintiffs group as an official religious community, the Plaintiff decided to switch his allegiance from the Roman Rite to the Maronite Rite. (Id., Vol. 1 at p. 174, Vol. 2 at p. 279). After petitioning Bishop Zayek of the Diocese of St. Mary in Brooklyn, New York, for official recognition for his religious community, the Plaintiffs community was granted an ad experimentum status in 1989. (Id. Vol. 1 at p. 175)

On December 31, 1993, the Diocese of St. Mary withdrew its sponsorship of the Brothers of the Annunciation of Mary because the community was not growing. (Id. at p. 224). The "Brothers" reverted to the status of laypersons

within the Catholic Church, and were no longer qualified to wear religious

[3]

garb. (Id., Vol. 2, at p. 385). As a result of the Diocese of St. Mary's withdrawal of its official recognition, the Plaintiff sought to return to the Roman Rite. The Diocese of Cleveland has not recognized the "Brothers" and Plaintiff did not seek new sponsorship of his community by the Cleveland Catholic Diocese. (Id., Vol. 1, at pp. 240-241).

Defendant, Father John Hengle ("Father Hengle"), has been the pastor of Our Lady of Victory Church in Tallmadge, Ohio since July 1 of 1993. Our Lady of Victory is a Roman Catholic Church within the Diocese of Cleveland and is subject to Bishop of Cleveland. As pastor of Our Lady of Victory Church, Father Hengle answers directly to the Bishop of the Diocese of Cleveland, Anthony M. Pilla. When Father Hengle first became the pastor of Our Lady of Victory Church in 1993, the Plaintiff, Gabriel Ward, was already employed at Our Lady of Victory. The Plaintiff was responsible for bookkeeping, payroll and accounts payable. (Id., Vol. 2, at pp. 307-310).

After Father Hengle arrived at the church in July of 1993, he indicated to the staff members, including Plaintiff, that he would observe each of them for one year before he took any actions with regard to their continued employment. In June of 1994, Father Hengle met with the Plaintiff to discuss the renewal of the Plaintiff's employment contract. At that time, Father Hengle informed the Plaintiff that he was required to obey the directives of the Diocese of Cleveland

concerning dress in religious garb while employed at the Parish. (Id. at pp. 317-322).

Father Hengle made it clear to the Plaintiff on June 28, 1994 that, as a condition of future employment with Our Lady of Victory Parish, he was not to wear his habit while working and could not insist upon being addressed as "Brother." (Id., Vol. 1, at pp. 203,204, 207-211). These conditions were imposed because Plaintiff had no sponsorship by any Catholic

Diocese to dress as a religious and it would have created confusion in the parish to allow this man to be seen dressed in a habit.

Subsequently, Father Hengle refused to enter into an employment contract with the Plaintiff as a result of Plaintiff's insistence on dressing in a religious habit and acting in a manner directly contradictory to the directives of the Bishop of the Cleveland Diocese. (Id. at p. 212).

Plaintiff is now an ordained minister in the Autocephalous Orthodox Church (a religion which, according to the Plaintiff, is "seeking communion with the Catholic Church."). Unknown to the Defendants, at the time of the June 28 meeting, Plaintiff and his "order" had been affiliated with the Autocephalous Orthodox Church for five months. (Id. at pp. 230-233). Plaintiff simultaneously sought Defendant's permission to retum to the Roman Catholic Rite from the Maronite Rite within the Catholic Church. (Id. at p. 240-241).

Plaintiff insists that while wearing a habit is not essential to the practice of his faith his ability to practice his faith would be impaired if he could not wear it. (Id. at pp. 171-175). Yet, the Plaintiff admits that wearing a habit is of no consequence to the practice of the Catholic Faith. (Id. at pp. 237, 242). Plaintiff states that he has always been, and his order is now, Catholic. (Id. at pp. 230-236). Plaintiff is petitioning the Catholic Church, seeking to gain communion for his order. (Id. at pp. 233-234). Yet the Plaintiff denies the authority of the Bishop of the Cleveland Catholic Diocese. (Id. at pp. 240-246).

Plaintiff now claims that he is the victim of religious discrimination because he, who is not the member of a sanctioned religious community within the Catholic Church, is not permitted to wear a religious habit while working at Our Lady of Victory Parish.

[5]

ARGUMENT

Plaintiff's, Brother Gabriel Ward's, actual complaint is his disappointment that the Catholic Church will not sanction the order he calls, the "Brothers of the Annunciation of Mary." For fifteen years, from 1979 to 1994, Plaintiff sought the recognition by the Catholic Church, in order to "have credibility with regards to the authority of the church." (Tr. of Pr., Vol. 1, at p. 165). This doctrinal dispute is not a justiciable issue for a Civil Court.

The Defendants, through Father John Hengle (Pastor the parish of Our Lady 'of Victory Catholic Church), offered

Plaintiff an employment contract. An oral condition of the offer was that Plaintiff would comply with the doctrinal requirement that he not wear a habit while at the parish. The Plaintiff has known the doctrinal requirements to be authorized to wear a habit for fifteen years. Father Hengle explained that the Plaintiff could not be employed at the parish if the Plaintiff insisted on disregarding' the requirements. Yet Plaintiff insisted on wearing the habit while at the parish. When Defendant, Father Hengle, would not sign or execute the contract offered on June 28, 1994, Plaintiff brought this action. (See Complaint, Appendix A-1).

Ironically, without informing the Defendants or the parishioners from whom he sought charitable contributions (Tr. of Pr., Vol. 1, at pp. 237-239, 241-244), Plaintiff and his "Order" had affiliated with a non-Catholic church, the Autocephalous Orthodox Church. Yet even today, Plaintiff still seeks recognition from the Catholic Church for his order, and the theme of Plaintiff's testimony and argument is that the Diocese is interpreting Catholic doctrine incorrectly.

"It is a paradox that disputes among church members, like disputes in families, can become emotional and bitter despite the high motives and essential decency of the people involved." Fonken v. Community Church of Kamrar (Iowa 1983), 339 N.W.2d 810. The Iowa Supreme Court was called

on in Fonken to settle a property dispute when members of a local parish decided to withdraw from the United Presbyterian Church of the United States of America. The Fonken Court recognized the traditional deference given to a hierarchical

church in matters of church governance, and also that "neutral" principles of law could only be applied in a dispute over church governance "so long as the approach involves no consideration of doctrine." Id. at 813 (citing Jones v. Wolf (1979), 443 U.S. 595,602).

The dispute raised by Brother Ward, Plaintiff, cannot be decided, and was not decided in the court below, without an extensive consideration of church doctrine.

I. The Trial Court erred to the prejudice of Appellants by failing to grant Defendants/Appellants Motion for Summary Judgment.

It is respectfully submitted that neither this Court, the Court below, nor a jury, may lawfully render an adverse judgment against the Defendants on the issues raised by Plaintiffs Complaint. A decision adverse to the Defendants would materially alter the Defendants' interpretation and practice of traditional church doctrine. Respect for the free expression and exercise of religion is a fundamental tenet of U.S. Constitutional Law. In a decision that predates the First Amendment's application to the States through the Fourteenth Amendment, the United States Supreme Court held:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect

> ....All who unite themselves to such a body [the church] do so with an implied consent to [its] government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, **that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for**.
>
> [7]

Watson v. Jones (1871), 80 U.S. (13 Wall.) 679, 728-29, 20 L.Ed. 666, 676-77 (emphasis added).

By submitting this action to a jury the Trial Court decided against the weight of 125 years of jurisprudence, and allowed a secular jury to decide that it was a higher authority than the Catholic Church concerning the governance of the Cleveland Catholic Diocese.

A. The Trial Court violated the First Amendment to the Constitution of the United States which prohibits Civil Courts from adjudicating controversies over religious doctrine and practice.

The rule established in Watson, supra, became a matter of constitutional proportion applicable to the states in

Kedroff v. St. Nicholas Cathedral (1952), 344 U.S. 94 in which the court observed:

> The opinion [Watson v. Jones] radiates.. a spirit of freedom for religious organizations, and independence from secular control or m.nipulation--in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

Id. at 116; see also, Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church (1969), 393 U.S. 440.

In Serbian Orthodox Church v. Kelemen (1970), 21 Ohio St.2d 154, the Ohio Supreme Court determined a property dispute between two ecclesiastical bodies in light of the Supreme Court of the United States' decision in Hull Memorial, supra. Applying the First Amendment Establishment Clause principles enunciated in Hull Memorial, the Ohio Supreme Court observed:

> While we recognize that these matters of internal church organization are chronic sources of disagreement for the parties and are frequently mentioned in the pleadings, briefs and arguments, ..., the Hull Memorial case offers the strong suggestion that civil courts cannot constitutionally determine matters of church government.

[8]

Kelemen at 159.. In the case *sub judice the* jury found that

church doctrine violated Plaintiff's rights. In order to affirm the Trial Court, this Court must examine Plaintiff's activity as well as church doctrine. "The Hull Memorial case, supra, held that a jury could not make such an examination, and the viability of the principle of the Hull Memorial case commands the same judicial abstinence in the instant ease." Kelemen at 159-60 (emphasis added).

The Bishop of the Diocese of Cleveland has the authority, and not a Trial Court. to issue directives regarding the proper dress in matters such as this. It is the Roman Catholic Church which has religious authority over such matters, and not a jury. Such was the case in Dragelevich v. Ragasich (Crt. ofApp. Mahoning Cty. 1970), 24 Ohio App.2d 59 which held:

> 1. The First Amendment to the United States Constitution prohibits civil courts from adjudication of controversies over religious doctrine and practice.
>
> 2. Religious organizations have the power to decide matters of church government for themselves, free from state interference ....
>
> 3. In the absence of fraud, collusion, or arbitrariness, the decisions of proper church tribunals on matters purely ecclesiastical, such as the appointment of a clergyman, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.

Id. at ¶¶1-3 of the syllabus.

Simply by hearing this action the Court below unduly burdened the Defendants' exercise of religion and created an impermissible entanglement between the state and the Catholic Church. (Discussed further in Section III below.)[11]

[9]

B. The Trial Court erred when it exercised jurisdiction, because the Catholic Church is exempt from Title VII prohibitions.

1. 42 U.S.C. §2000e-1 expressly prohibits this claim against the Defendants/Appellants, a religious organization.

42 U.S.C. §2000e-2(a) provides that it is an unlawful employment practice for an employer:

> (1) To fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or natural origin ....

---

[11] The very nature of the testimony of this case belies the "non-religious" nature of this controversy, e.g.: the examination of the jury venire, testimony regarding the Franciscan Order, testimony explaining Canon Law, cross-examination using the Catholic Catechism. Even the Court below noted misgivings about breaching the wall of separation between Church and State. (Tr. of Pr., Vol 2, at 421).

Id. Notwithstanding this broad, statutory prohibition, Congress acted to exempt religious groups from Title VII prohibitions:

> This Title shall not apply to an employer with respect to... a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Civil Rights Act of 1964, Title VII, §702, as amended and codified at 42 U.S.C. §2000e-1.

In the instant case, it cannot be disputed that the Defendants fit within the exemption provided in Title VII. The Plaintiffs argument that he was a "secular" employee of Our Lady of Victory Church is a distinction without a difference under 42 U.S.C. §2000e-1.

In Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos (1987), 483 U.S. 327, the Supreme Court of the United States held that applying the religious exemption to Title VII's prohibition against religious discrimination in employment to secular non-profit activities of religious organizations did not violate the establishment clause. In that case, the Mormon church hired an individual to work at a gymnasium. In 1981, the employee, an assistant building engineer, was discharged because he failed to qualify for a temple recommend, a certificate that he is a member of the Church and eligible to attend its temples. Id. at

330. The Supreme Court reversed the lower court finding that applying the "religious organizations" exemption of 42 U.S.C. §2000e-1 violated the Establishment Clause of the First Amendment, holding:

> ...[A]s applied to the non-profit activities of religious employers, §702 [codified at 42 U.S.C. §2000e-I] is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions.
>
> It cannot be seriously contended that §702 impermissibly entangles church and state; **the statute effectuates** a more **complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in this case.**

Id. at p. 339 (emphasis added).

The reasoning behind the Supreme Court's decision in Amos, supra, is instructive:

> **...[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.** The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential

> liability might affect the way an organization carried out what it understand to be its religious mission.

Id., at 335-336 (emphasis added)

That exemption has been applied specifically to a situation where the attire of an employee has become the center of controversy. In granting summary judgment for the Defendant/employer, the court in Equal Employment Opportunity Commission v. Presbyterian Ministries, Inc., held that:

> Title VII may not be construed to force a religious institution to countenance the display of religious symbols contrary to the image and environment that the institution wishes to create and maintain. To protect Plaintiffs exercise of her religion on the premises of PMI's Exeter House, would be to favor her religious exercise over PMI's on PMI's own premises and to impermissibly interfere with PMI's operation of Exeter House. PMI justifiably considered Plaintiff's display of her own religious preference at the highly visible reception desk all the more inappropriate from its point of view.

E.E.O.C.v. Presbyterian Ministries, Inc (W.D. Wash. 1992), 788 F.Supp. 1154, 1157-58.

[11]

The facts of Presbyterian Ministries, are intriguing and closely resemble the facts and issues raised by the case *sub judice*. Jacqueline Brooks worked as a receptionist at a

retirement home operated by Presbyterian Ministries, Inc. Presbyterian Ministries (hereinafter referred to as "PMI") objected to the head coverings that Ms. Brooks chose to wear as required by her Muslim faith. The

Presbyterian Ministries Court held:

> Section 702 [codified at 42 U.S.C. §2000e-1] is an exemption that applies to PMI under the circumstances of this case. It can not be seriously disputed the Christian nature of Exeter House was obvious from the most cursory view even before the modifications of the personnel manual .... Merely because PMI did not actively inquire to Plaintiff's religion does not provide a mechanism for an employee to subsequently begin to assert a non-Christian religious belief in such a manner deemed inappropriate by PMI. Such a limited interpretation of the exemption would result in intolerable intrusions into the operation of a religious entity's own agencies.
>
> Certainly, PMI may determine for itself what environment it seeks to provide in its agencies such as Exeter House. The employees' actions, attitudes, and appearances are obviously an important element in creating that environment. The receptionist position is important in conveying an initial first impression, and Exeter House must be free to determine the impression it wishes to convey; the receptionist may not dictate to PMI in this regard. **Plaintiff is free to exercise her religion, but she may not do so on PMI premises in a way that PMI deems is contrary to its interests.**

Id. at 1156 (emphasis added).

In Little v. St. Mary. Magdalene Parish (3rd Cir. 1990), 929 F.2d 944, a non-Catholic elementary school teacher's contract was not renewed because she failed to obtain an annulment of her first marriage before remarrying. The school teacher brought a complaint pursuant to 42 U.S.C. §2000e-2. The Trial Court granted summary judgment on Plaintiff's Title VII claim and that order was affirmed by the Circuit Court. The court held that the religious organization exemption of 42 U.S.C. §2000e-1 applied and noted:

[12]

> Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption broadly. We conclude that the permission to employ persons "of a particular religion" includes permission to employ only persons whom beliefs and conduct are consistent with the employer's religious precepts. Thus, it does not violate Title VII's prohibition of religious discrimination for a parochial school to **discharge a Catholic or a non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles.**

Id. at 951 (emphasis added).

In the case at bar, Father Hengle clearly stated that it was necessary for him to enforce the directives of the Bishop of the Diocese of Cleveland regarding the Brothers of the Annunciation of Mary. (Tr. of Pr., Vol. 2, at p. 307-308,

321-323,409-410, 416-417). Father Hengle could not have allowed Plaintiff to wear his habit religious habit and be addressed by the term "Brother" without contradicting the direction of Bishop Anthony Pilla. Thus the Defendants are clearly within "religious organizations exemption" of 42 U.S.C. 2000e-1.

2. Defendants/Appellants Are Entitled To Judgment On Plaintiff's First Cause Of Action Under R.C. §4112.02(A) Because Ohio Courts Have Determined That Case Law Interpreting Title VII Of The Civil Rights Act of 1964, 42 U.S.C. §2000 et seq. Is Applicable To Cases Involving Alleged Violations of R.C. Chapter 4112.

R.C. §4112.02 of the Ohio Revised Code provides:

It shall be an unlawful discriminatory practice:

> (A) For any employer, because of race, color, religion, sex, natural original, handicap, age, or ancestry of any person, to discharge, without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or of any matter directly or indirectly related to employment.

Although R.C. §4112 et seq. does not have a religious organizations exception, Ohio Courts have long held that federal case law construing 42 U.S.C §2000 et seq. applies to

actions brought under R.C. §4112 et seq. In Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission (1981), 66 Ohio St.2d 192, the Ohio Supreme Court observed that:

> In previous cases...we have determined that federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq. Title 42 U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112. Republic Steel v. Ohio Civil Rights Comm. (1975). 44 Ohio St.2d 178; Weiner v. Cuyahoga Community College District (1969), 19 Ohio St.2d 35 ....

Id. at 196.

Ohio Courts have not retreated from the rule set forth in Plumbers. Ohio Courts are clear that when interpreting Ohio Law dealing with alleged discrimination, Title VII of the Civil Rights Act of 1964 is applicable. Little Forest Med. Crt. of Akron v. Ohio Civ. Rights Comm. (1991), 61 Ohio St.3d. 607, 610; Frank v. Toledo Hospital (Court of Appeals Lucas County 1992) 84 Ohio App. 3d 610, 612.

Because the Defendants are exempted from the requirement of 42 U.S.C. §2000 *et seq.*, Defendants are entitled to judgment as a matter of law on Plaintiff's Federal and State law claims.

C. Even if the Trial Court could have constitutionally exercised jurisdiction in this case the Plaintiff/Appellee failed to establish

a *primafacie* case of religious discrimination.

Those cases that touch upon the religious discrimination proscribed by Title VII involve requirements of a religion. Typically Plaintiffs in Title VII cases complain that they have lost employment, lost unemployment opportunity, or suffered a demotion because they cannot, by way of example only, work due to a religious obligation to worship on Saturday or Sunday. The case at bar involves no such religious requirement or obligation.

Plaintiff wants the freedom to wear a religious garb (habit) to his job at Our Lady of Victory. He does not belong to a sanctioned religious community, but does admit that the garb

[14]

itself, a religious robe, is a symbol of a formal, religious status. (Tr. of Pr., Vol. 1. at pp. 225-230). The contradiction is of no moment to the Plaintiff but is of great concern to the Bishop of the Cleveland Catholic Diocese. The Bishop has instructed the Plaintiff and the other members of this "community" that they are not recognized and are not permitted to wear a habit or call themselves "Brothers." (Id. at pp. 220-226, 240-244).

A habit is a symbol of the hierarchy and authority of the Church and it does not affect an individual's practice of the Catholic faith. It is not a tenet of the Catholic faith and never has been. Refusal to allow Plaintiff to work at Our Lady of Victory Parish, as long as he wears a religious habit, does not impair his ability to practice his faith. The refusal simply

runs contrary to Plaintiff's personal belief about authority. (Id. at 224-228, 244-245). Clearly, Plaintiffs dispute is an ecclesiastical one that concerns his views on the authority of the Bishop of the Cleveland Catholic Diocese. Because at the root of this dispute is a challenge to church authority, it has no place in the
courts.

1. Under Federal Law, Plaintiff Has Failed To Establish A *Prima facie* Case Of Religious Discrimination.

In Ohio, there is very little case law construing R.C. {}4112.02(A). See e.g., Southwind Motel v. Ohio Civil Rights Commission (Franklin County 1985), 24 Ohio App.3d 209. The 6th Circuit Court of Appeals and Ohio State Courts have construed 42 U.S.C. §2000, et seq. when applying claims under R. C. 4112.02(A). Ohio courts have long held that federal case law construing 42 U.S.C. §2000, et seq. applies to actions brought under R.C. §4112, et seq. See Plumber, supra. In Cooper v. Oak Rubber Company, (6th Cir. 1994), 15 F.3d 1375, the 6th Circuit Court of Appeals explained the elements of *a prima facie* case of religious discrimination:

[15]

> The employee bears the burden of establishing a *prima facie* case. and sustains that burden by showing that he holds a sincere religious belief that conflicts with an employment requirement; that he has informed his employer of the conflict; and that he was discharged or disciplined for failing to comply with

> the conflicting requirement. Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987) .... Once a *prima facie* case is established, the burden shifts to the employer to show that it could not reasonably accommodate the employee without undue hardship. The reasonableness of an employer's attempt to accommodate is determined on a case-by-case basis. If the employer's efforts fail to eliminate the employeels religious conflict, the burden remains on the employer to establish that it is unable to reasonably accommodate the employee's beliefs without incurring undue hardship. Id. To require an employer to bear more than a de minimis cost in order to accommodate an employee's religious beliefs is an undue hardship. TransWorld Airlines, Inc. v. Hardison, 432 U.S. 63, 84... (1977).

Id. at 1378 (emphasis added); see also, Equal Employment Opportunity Commission v. Arlington /ransit Mix, Inc. (6th Cir. 1991), 957 F.2d 219.

In fact, Plaintiff did not hold his belief enough to inform his employer, the Cleveland Catholic Diocese, that he was in fact a member of the Autocephalous Orthodox Church and not a Catholic. (Tr. of Pr., Vol. 1 at 230-233). Plaintiff hid his affiliation with a non-Catholic church, and cannot now claim discrimination based on the Autocephalous Orthodox Church.

2. Plaintiff Has Failed To Demonstrate, As A Matter Of Law, That His Personal Preference To Wear His Garb Is A "Sincere Religious Belief".

The Plaintiff totally failed to carry his burden to establish a *prima facie* case of religious discrimination. In point of fact, the Plaintiff failed to establish that he holds a "sincere religious
belief that conflicts with an employment requirement "Cooper, supra. The Plaintiff wants the freedom to wear a habit to his job at Our Lady of Victory Church. The Plaintiff admits that this garb, a religious robe, is a symbol of a formal, religious status. (Tr. of Pr., Vol. 1, at pp. 228-229) However, Plaintiff has no formal, religious status within the Catholic church. (Id. at pp. 234-235; Vol. 2, at pp. 280, 284-285,304, 338-340). Even more telling, however, is the patent admission of the Plaintiff that the

[16]

wearing of his habit **is not an article of faith for him.** (Id.. Vol. 1. at p. 227).

What is at issue in this case is not a "sincere religious belieF'; rather, what is involved is the PlaintifFs view of authority within the Catholic church and his own personal opinion. Even if the Plaintiff claimed that as a Franciscan he was required to wear certain garb. he is incorrect. (Id., Vol. 2 at pp. 375-377). Given the admissions of the Plaintiff it is clear that the Plaintiff's claim does not involve a religious tenet or belief. It involves Plaintiff's preference to dress in a particular way which, in the opinion of the Bishop of the Cleveland Catholic Diocese, is misleading to the members of the church community of Our Lady of Victory.

The Plaintiff's preference to wear religious garb while at work does not rise to the level of a "religious belief' for the

purposes of R.C. §4112.02(A). The United States Supreme Court has enunciated a test to determine whether an individual's beliefs are "religious". See United States v. Seeger (1965), 380 U.S. 163. The Court's definition is instructive:

> A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.

Id. at 176.

Plaintiff's **preference** to wear religious garb while at work also does not rise to the level of **religious practice** as defined by the Code of Federal Regulations: "...[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. ¶1605.1

The Fifth Circuit Court of Appeals has also identified three major factors which enter into a determination of whether a belief is "religious":

[17]

> The "religious" nature of a belief depends on (1) whether the belief is based on a theory of" man's nature or his place in the universe," (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is sincere.

Brown v. Dade Christian Schools, Inc. (5th Cir. 1977), 556 F.2d 310, 324 (dissent) (citations omitted), cert. denied (1978), 434 U.S. 1063.

Furthermore, the United States Supreme Court has characterized a "religious belief or practice" as "...**not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.**" Wisconsin v. Yoder (1971), 406 U.S. 205, 215-16 (emphasis added); see also, Brown v. Pena (S.D. Fla 1977), 441 F.Supp. 1382, aff'd. (5th Cir. 1978), 589 F.2d 1113.[12]

D. Plaintiff/Appellee's claim of religious discrimination is prohibited because the Plaintiff failed to exhaust his administrative remedies.

PlaintifFs claim is barred because he did not exhaust his administrative remedies with the Equal Employment Opportunity Commission [EEOC]. It is well-settled law that no Title VII claim may be brought until the administrative remedies have been exhausted. See Haithcock v. Frank (6th Cir. 1992), 958 F.2d 671,675; see also, Ang v. Proctor & Gamble Co. (6th Cir. 1991), 932 F.2d 540, 545; see also, Weeden v. Frank (6th Cir. 1994), 16 F.3d 1223, cert. denied (1995), 115 S. Ct. 1114.

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[12] The direct and cross examinations of the Plaintiff are instructive: the order of St. Francis is not a religion, it is a Catholic religious order which adheres to all the tenets of the Catholic Church.

In Dadas v. Prescott, Ball & Turben (N.D. Ohio 1981), 529 F.Supp. 203, the Plaintiff failed to exhaust her administrative remedies pursuant to R.C. §4112.01 et seq., in a claim for sex discrimination. As a result the District Court held that the Plaintiff was barred from pursuing relief under R.C. §4112.01 et seq.

[18]

> The Ohio legislature has established an administrative procedure for remedying sex discrimination by employers. 4112.01 et seq. The Ohio Civil Rights Commission is created by § 4112.03. Ohio Revised Code § 4112.05 authorizes this Commission to accept charges of discriminatory practices. When a complainant is aggrieved by a final order of the Commission he may seek judicial review. Ohio Revised Code § 4112.06. **However, administrative procedures must first be followed. The plaintiff having failed to exhaust her administrative procedures may not have an action under Ohio Revised Code §4112.**

Id. at 205 (emphasis added); see also, Howard v. State Farm Insurance Co. (1978). 61 Ohio App.2d 198.

In the instant case, there is no evidence to indicate that the Plaintiff filed any claim with the EEOC. Without such evidence, Plaintiff's claim pursuant to 42 U.S.C. §2000e et seq. is improper and summary judgment should have been granted on this claim.

II. The Trial Court erred to the prejudice of

Appellants by denying Defendants/Appellants' Motion for Directed Verdict made at the close of Plaintiff/Appellee's case-in-chief by determining that a jury issue was presented on "Waiver."

A. The Plaintiff's theory of waiver is not applicable as a matter of law to Title VII Discrimination Claims against religious organizations.

Plaintiff argued in pleadings and at trial, without the benefit of citation to applicable law, that the Defendants somehow waived the religious organization exemption provided by 42 U.S.C. §2000e-1. (Tr. of Pr., Vol. 2, at 364-365; see also Appendix A-3, A-5).

> Plaintiff contends that the adoption and carrying out of an express policy of nondiscrimination in employment on the basis of religion constitutes a waiver of the exemption under 42 U.S.C. 2000e-1 that otherwise allows a religious organization to practice religious discrimination in employment. At the very least, this presents a genuine issue of material fact as to waiver of the protection of the exemption, which therefore precludes the granting of summary judgment on Plaintiffs claims under 42 U.S.C. 2000 et seq.

See Appendix A-3, at pp. 8-9.

As discussed above (at Section I.B.), notwithstanding Plaintiffs assertion of a novel, insupportable legal theory, 42 U.S.C. §2000e-1 unequivocally provides: "This title shall not

apply to an employer with respect to... a religious corporation "Id. As pointed out above (Section I.B.) the religious organization exemption applies equally to a religious organization's religious activities and non-religious activities. See Amos, supra, 483 U.S. 327.

In Little v. St. Mary. Magdalene Parish (3rd Cir. 1991), 929 F.2d 944, the court rejected a "waiver" argument by stating:

> Little argues that even if the Parish's decision is exempted from Title VII the Parish waived those exemptions when it knowingly hired a Protestant. This argument incorrectly views the exemptions for religious schools as a privilege or interest granted to those organizations. Instead, those exemptions reflect a decision by Congress that the government interest in eliminating religious discrimination by religious organizations is outweighed by the rights of those organizations to be free from government intervention.

Id. at 950-951 (internal cites deleted).

The exemption of Defendants from employment discrimination statutes reflects the recognition that attempting to govern the employment practices of a religious institution would violate the Constitution. See Amos, supra, at 339. This exemption is not a privilege, it is a clear statement that the statute does not apply. Because the religious organization exemption is applicable in this case, Plaintiff's claims are without merit. Therefore, Judgment in favor of Defendants

should be have been granted as a matter of law.

B. As a matter of law, the Defendants/Appellants' employment policies did not constitute a waiver of Defendants/Appellants' First Amendment Right to govern their ecclesiastical disputes free from judicial interference.

Courts have required any waiver of important Constitutional fights must be knowing and intelligent and consents to their violation must be strictly construed.

Waiver is an equitable theory, akin to estoppel, and thus a question of law. "The party seeking to prove the waiver must do so by showing a clear, unequivocal, decisive act by the other

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party of such a purpose it amounts to an estoppel on that party's part." North Olmstead v. Eliza Jennings, Inc. (Crt. of Appeals Cuyahoga Cty. 1993), 91 Ohio App.3d 173, 180.

In the instant case there are no contested issues of fact surrounding the circumstances of the fifteen-year relationship of Defendants and Plaintiff, Brother Ward. In that fifteen-year history the Defendants have consistently followed and enforced the Canon Law. The only evidence Plaintiff has produced for his theory of waiver is the written employment policy of the Cleveland Catholic Diocese. (Tr. of Pr., Vol. 1 at p. 206, Vol. 2 at pp. 269-275, 287-288, 319-322) (Plaintiff cross-examined using the catechism of the Catholic Church to

imply that the Church is required by doctrine to waive its First Amendment rights. Id., Vol. 2 at 397.) Plaintiff argued that the aspiration to be an equal oppommity employer was a waiver of Statutory and Constitutional rights. But in the written policy, submitted in evidence, that aspiration was clearly subordinated to the "mission of the Diocese consistent with the teachings and traditions of the Roman Catholic Church." (Id. at pp. 270-271).

The interpretation of a writing that is part of a contract is a question of law' for the court and not a question of fact for a jury. As a matter of law the Defendants' employment policy expressly reserved the tight to act consistently with the doctrinal requirements of the Catholic Church.

"It is fundamental that, when a waiver of a constitutional right is involved, there is a presumption against waiver, rather than the acquiescence in the loss of a basic constitutional right." Columbus v. Woodrick (Crt. of Appeals Franklin Cty. 1976), 48 Ohio App.2d 274, 278. As a matter of law "courts should indulge in every reasonable presumption, arising from the particular facts and circumstances of the case, that inveighs against any waiver of fundamental constitutional rights." State v. Jones (1974), 37 Ohio St.2d 21, 24-25 (citing Johnson v. Zerbst (1938), 304 U.S. 458,464).

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The Court below erred as a matter of law when it proceeded despite the Plaintiff's admission that their claims entirely relied upon the theory of waiver. (Tr. of Pr., Vol. 2 at 364, see also Appendix A-3). While the Trial Court was

correct that in determining a motion for directed verdict the evidence must be viewed in the light most favorable to the opponent of the motion, **there is no evidence that supports the existence of a waiver of constitutional rights by the Defendants.** The Trial Court compounded this error at the close of trial by issuing jury instructions and allowing the jury to decide the existence of a waiver, which as a matter of law did not exist. (Tr. of Pr., Vol. 3, at pp. 478-479).

III. The Trial Court erred and violated Defendants/Appellants' freedom of religion guaranteed by the First Amendment to the Constitution of the United States when it failed to grant Defendants/Appellants' Motion for a Directed Verdict made at the close of all evidence.

The judgment of the Court below stands as an affront to the First Amendment rights of the Catholic Church. One hundred and twenty-five years of American jurisprudence have".. affirmed the fundamental right of churches to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Equal Employment Opportunity Commission and Elizabeth McDonough v. Catholic University of America (D.C. Cir. 1996), 83 F.3d 455, 462 (quoting Kedroff, supra 344 U.S. at 116). The Court of Appeals in McDonough affirmed the District Court's dismissal of an employment discrimination action similar to the instant case. The EEOC and Sister McDonough claimed sex discrimination against Catholic University over the decision not to grant her tenure. The District Court determined, and the Court of Appeals agreed, that applying Title VII "would violate both the free exercise and the establishment clauses [of the First Amendment]." Id.

at 460 (internal cites deleted). The McDonough Trial Court **dismissed the case before reaching the merits** because judicial determination would constitute, and

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the investigation by the EEOC has constituted excessive entanglement with religion." Id. (internal cites deleted).

Concerning the impermissible entanglement with religion that violates the establishment clause of the First Amendment, the McDonough Court reminded that entanglement occurs in situations "where a protracted legal process pits church and state as adversaries." Id. at 465 (internal cites deleted). The Circuit Court affirmed the District Court's finding that it is not reasonably possible nor legally permissible for a lay trier of fact to evaluate competing opinions on religious subjects. Id.; see also Amos, supra.

The McDonough Court found that the discrimination claims were also barred by the Religious Freedom Restoration Act of 1993 (RFRA, codified as 42 U.S.C. § 2000bb, et seq.). McDonough at 470. RFRA re-establishes the requirement found in Wisconsin v. Yoder, (1972) 406 U.S. 205 that the state must demonstrate a compelling governmental interest before substantially burdening the exercise of religion, even if the burden is the result of a rule of general applicability. McDonough at 468. (RFRA is not a new argument for purposes of waiver: RFRA has restored the compelling interest test which is applicable to the instant case. McDonough at 468.)

In the instant case Plaintiff admits that the reason for

the Defendants' decision not to renew his contract was purely doctrinal, that as a matter of Catholic doctrine Plaintiff was not authorized to wear the religious garb he preferred. Plaintiff can present no compelling reason for the usurpation of the authority of the bishop of the Cleveland Catholic Diocese to decide this matter of Church governance.

IV. The Trial Court erred to the prejudice of Appellants by denying the Defendants/Appellants Motion for Judgment Notwithstanding the Verdict.

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A. As a matter of law, the Defendant has demonstrated that Accommodating PlaintifFs particular religious expression would constitute substantial harm.

Plaintiff's particular expression of his self-proclaimed religious beliefs is fundamentally inconsistent with the Defendants' religious practice. There was ample evidence presented by the Defendants that requiring the Plaintiff to continue to work as an employee of the Defendants under the present circumstances would cause substantial hardship. In fact the record shows that Plaintiff desired to express a personal religious status that was contrary to the religious authority of the Defendants, while employed on the premises of the Defendants' parish.

Case law interpreting the kind of reasonable accommodations an employer must make for an employee's religious beliefs has consistently rejected the imposition of undue hardship. TWA v. Hardison (1977), 432 U.S. 63;

McDaniels v. Essex International, Inc. (6th Cir. 1978), 571 F. 2d 338: Settles v. Wicks Labor Division (6th Cir. 1980) unpublished, 624 F. 2d 1101 (attached at A-12). As a matter of law, any accommodation which is more than *de minimis* for an employer, is unreasonable. See, Settles, supra.

In Smith v. Pyro Mining Co. (6th Cir. 1987), 827 F. 2d 1081, the court found undue hardship placed upon an employer for switching days for an employee based upon the employee's religious beliefs. Likewise, in Reid v. Memphis Publishing Co. 521 F. 2d 512 (6th Cir. 1975), the court stated: "The clear language of the statute does not indicate that Congress has ever intended to coerce employers into accommodating all the religious practices of their employees or prospective employees." Id. at 519. The court in Reid found the accommodation requested by the employee unreasonable because it imposed an undue hardship on the employer. Therefore, the employee's claim was rejected. Id. at 520.

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Therefore, as a matter of law, the accommodation Plaintiff requests is patently unreasonable and imposes an undue hardship. On this basis alone, Plaintiff's claims must be dismissed.

B. The Plaintiff did not present evidence at trial supporting a claim for compensatory damages in excess of lost wages.

42 U.S.C. §2000e-5(g)(1) provides the remedies a party may pursue in an employment discrimination case:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without, back pay....

The underlying purpose of a back pay is to place the victim in a position he would have been in had the discrimination not occurred. E.E.O.C.v. Ford Motor Co. (4th Cir. 1981), 645 F.2d 183, 185, rev'd on other grounds (1982), 458 U.S. 219; Comacho v. Colorado Electric Technical College, Inc. (10th Cir. 1978), 590 F.2d 887, 889.

In contrast, O.R.C. 4112.99 broadly provides: "Whoever violates this chapter is subject to a civil action for damages, injunctive relief or any other appropriate relief." A Plaintiff pursuing relief under O.R.C. 4112.99 may recover "civil damages" for back pay, intentional infliction of emotional distress, punitive damages, etc., Crihfield v. Monsanto Co. (S.D. Ohio 1994), 844 F. Supp. 371, 372.

In the case at bar, the Plaintiff only presented evidence of his lost wages as damages. No evidence supporting an award for other damages exists. Remarkably the jury awarded Plaintiff $5,300 for "compensatory damages or losses in addition to his salary."

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C. The Plaintiff did not present evidence at

trial supporting a claim for punitive damages.

Title VII of the Civil Rights Act, §102(b)(1) and (2), Codified at 42 U.S.C. §2000e-5, provides that a prevailing party may recover punitive damages only where "the respondent [i.e. employer] engaged in a discriminatory practice with malice." This means the Plaintiff bears the burden of proving the Defendants acted with an evil intent or a reckless indifference to the federally protected rights of the Plaintiff. Smith v. Wade (1983), 461 U.S. 30, 56.

> The purpose of awarding punitive damages is to "punish a wrongdoer for his outrageous conduct and to deter others from engaging in similar conduct." Id. Such an award must be supported by the record, and may not constitute merely a windfall for the plaintiff. Id., Rodgers v. General Motors Corp., 739 F.2d 1102, 1109 (6th Cir. 1984), cert. denied, -U.S.- 105 S. Ct. 1759, 84 L. Ed.2d 821 (1985); McKinley v. Trattles, 732 F.2d 1320, 1327 (7th Cir. 1984).

Yarbrough v. Tower Oldsmobile, Inc. (7th Cir. 1986), 789 F.2d 508,514.

In the case at bar, the Plaintiff admitted that wearing his habit is/was not an article of faith for him. The Plaintiff's preference to wear religious garb has nothing to do with his religious practice or beliefs. There was absolutely no evidence present at trial that the Defendants intentionally engaged in any type of conduct that warranted the Court's instruction on punitive damages or that warranted punitive damages. Absent any such evidence, judgment must be entered in favor of the

Defendants on Plaintiff's punitive damage claim.

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V. The Trial Court erred when it conducted voir dire which systematically excluded persons of the Roman Catholic Faith from the jury and violated: Defendants/Appellants' right to a jury trial guaranteed by the Ohio Constitution Article I, Section 5, and the Seventh Amendment to the Constitution of the United States; and Defendants/Appellants' rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Plaintiff's attorney concluded his voir dire examination with a blanket challenge of all of the venirepersons identified as Catholic. This wholly improper and unconstitutional challenge was clothed by Plaintiff's assertion that the seven Catholic jurors identified had a definite, pecuniary interest in the outcome of the case. (Tr. of Pr., Vol. 1, at P. 68). Unfortunately. while the Trial Court correctly denied Plaintiff's blanket challenge, the court then impermissably allowed a prejudicial voir dire that essentially accomplished the exact same unconstitutional exclusion. (Id. at pp. 91-135.)

The court dismissed the prospective panel and then called in each of the prospective jurors identified as Catholic to undergo an individual voir dire--one at a time, out of sight of the entire panel. The seven ensuing interrogations ranged far afield of any alleged pecuniary interest in the case at hand. At the end of this extensive investigation only one of the seven jurors admitted that he could not guarantee being

impartial--each of the others guaranteed the court that they would follow the judge's instructions. (Id. at p. 109-110).

Yet the court excluded four of the seven Catholic jury venirepersons,. (Id. at p.130). Plaintiff then used a preemptory challenge to strike a fifth Catholic from the jury. (Id. at p. 133).

The resulting change in the jury makeup can only be characterized as dramatic and systemic. The remaining two jurors who were identified as Catholic can only be considered as token representation. One of these two jurors professed to "believe in Catholicism to a point, but in the last ten years I haven's been a practicing Catholic." (Id. at p.95).

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"The right of trial by jury shall be inviolate "Ohio Constitution Article I Section 5: see also Amendment VII to the Constitution of the United States. "The right of trial by jury guaranteed by the constitution carries with it by necessary implication the right to a trial by a jury composed of unbiased and unprejudiced jurors." Lingafelter v. Moore (1917), 95 Ohio St. 384, at ¶1 of the syllabus. The error propounded by the Trial Court'is unprecedented in the annals of Ohio civil law, and one must look to criminal cases for precedent concerning the exclusion or substantial under-representation of one's race, creed or color.

In State v. Fulton (1991), 57 Ohio St.3d 120, the court ruled on the requirements to have standing to challenge the substantial under-representation of one's identifiable group from a jury.

> In order to obtain standing to challenge a grand jury array under the equal protection clause of the Fourteenth Amendment to the United States Constitution, the defendant must prove the procedure employed in the selection process resulted in a substantial under-representation of his or her race or of the identifiable group to which he or she belongs and the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied.

Id. at ¶1 of the syllabus.

The dire consequences of this violation of Defendant's right to a jury trial are best explained by the Supreme Court case Powers v. Ohio (1991), 499 U.S. 400. The Powers case concerned exclusions from a jury venire on the basis of race, but exclusion on the basis of religion is analogous and a violation of the identical constitutional provisions. See Fulton, supra. "Discrimination in the selection of jurors casts doubt on the integrity of the judicial process." Powers, 499 U.S. at 411 (internal cites deleted). This discrimination violates the rights of both the defendant and the jury member. Id. at 413-414. "Active discrimination ... during this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law."

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Id.. at 412. This cynicism is aggravated when religion is implicated during both jury selection and in the trial.

> The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The voir dire phase of the trial represents the "jurors first introduction to the substantive factual and legal issues in a case." The influence of the voir dire process may persist throughout the whole course of the trial proceedings . . . . there arise legitimate doubts that the jury has been chosen by proper means. The composition of the trier of fact itself is called in question, and the irregularity may pervade all the proceedings that follow.

Id. at 412-413.

In the instant case, every witness that the Plaintiff called as on cross-examination was employed by the Catholic Church. Every witness for the Defense was a member of a Catholic religious order or an ordained priest. The selection process so prejudiced the jury against the Defendants that Defendants were denied a fair trial, much less a trial by a representative cross-section of the community. See Fulton, supra. 57 Ohio St. 3d at 124-125. This conduct by the Court below clearly exceeds the discretion of the judge to conduct voir dire.

CONCLUSION

The critical issue raised by this appeal concerns the proper governance of a parish in the Cleveland Catholic Diocese. Will it, and the other parishes, be governed by courts and juries, or by the present Bishop and his appointed

successors? Will the Bishop of the Diocese of Cleveland determine, in accord with Canon Law, who is and who is not permitted to dress in a religious garb or will that right be relegated to black robe jurists? As a matter of Constitutional Law, the Religious Freedom Restoration Act, and the Ohio and Federal Civil Rights Statutes, a Civil Court may not render a judgment on a discrimination claim which nullifies the right of a religious organization to govern itself on matters which are peculiarly religious in nature. Because the dispute cannot be decided without substituting a jury's decision for that of Bishop Pilla on matters peculiarly religious, the Plaintiff's Complaint does not present a justiciable issue for a Civil Court.

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This case cannot be decided without the proceedings themselves violating the Defendants' Father John Hengle. Our Lady of Victory Catholic Church. and the Cleveland Diocese of the Roman Catholic Church, constitutionally guaranteed freedom of religion. Any religious tenet or practice can be viewed by outsiders as dogmatically archaic, unnecessarily ritualistic, and out of step with the enlightenment of the Twentieth Century. It is precisely for that reason that the Founding Fathers, the drafters of the Constitution and Supreme Court Jurists have mandated that Civil Courts abstain from involving themselves in decidedly church matters. Accordingly. Defendants/Appellants respectfully request the Court of Appeals to reverse the judgment of the Trial Court and render judgment in favor of Defendants/Appellants.

Ward v. Hengle, et al. - No. 18234

Respectfully submitted.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Brief of Appellant was delivered this ___ day of March, 1997 by regular U.S. Mail, postage prepaid, upon Richard E. Dobbins. Esq., Dobbins & Associates, Ridgewood Center, Suite 105, I000 South Cleveland-Massillon Road, Akron. Ohio 44333

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APPENDIX V

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98-167

IN THE SUPREME COURT OF OHIO

Brother Gabriel Ward Appellee.	) On Appeal from the Summit) County Court of Appeals) Ninth Judicial District
v.	)
Father John Hengle, et al. Appellants.	) Court of Appeals) Case No.: 18234

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS, FATHER JOHN HENGLE, OUR LADY OF VICTORY CHURCH, AND THE CLEVELAND CATHOLIC DIOCESE

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EXPLANATION OF WHY A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED AND WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

In this case, the single allegation of religious discrimination made by Appellee, Gabriel Ward, is that Appellants, Father John Hengle, Our Lady of Victory Church, and the Cleveland Catholic Diocese, conditioned Mr. Ward's continued employment at our Lady of Victory Catholic Church on his ceasing to wear a monk's habit and being addressed as "Brother". In fact, Mr. Ward was not a monk, and had been admonished by the Catholic Diocese to cease appearing in public in the dress of a monk.

The critical issue of this appeal concerns the proper governance of a Parish (Our Lady of Victory Catholic Church) within the Cleveland Catholic Diocese. Will it, and the other Parishes, be governed by courts and juries or by the present Bishop and his appointed successors? Will the Bishop of the Diocese of Cleveland determine, in accord with Cannon Law, who is and who is not permitted to dress in religious garb. the symbol of Catholic hierarchy, at a Catholic parish, or will that right be relegated to civil judges and juries? Will the claimed religious fervor of one person take precedence over the internal law of the Catholic Church?

This case raises the fundamental Constitutional question of whether a civil court may, in light of the establishment clause of the First Amendment of the Constitution of the United States, render judgment against a church for religious discrimination in that church's decision on whom to employ at one of its parishes. This case is about,

on one side, a man who wishes to be recognized as a monk. but has not met the requirements of the Catholic Church for that recognition, and on the other side. the Church. which must enforce its doctrine. As a matter of Constitutional law, a civil court may not render a judgment on a discrimination claim which

[1]

nullifies the right of a Church to govern itself on matters which are peculiarly religious in nature.

The decisions of the Courts below violate Appellants', Father Hengle's, Our Lady of Victory, Catholic Church's, and the Cleveland Diocese of the Catholic Church's, constitutionally guaranteed freedom of religion. Further, the interpretation of the Ohio Civil Rights Act, as espoused by the trial court and the Court of Appeals places "a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious,"[1] and creates a constitutionally impermissible entanglement between Church and the State.

Title VII of the Civil Rights Act of 1964, in due deference to the Constitutional guarantee of religious freedom, includes a specific statutory exemption for religious organizations from claims such as that asserted by Plaintiff/Appellee in this case. This Court has never decided

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[1] *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos* (1987), 483 U.S. 327. 335-336.

whether a similar exemption must be implied in the Ohio Civil Rights Act, codified at R.C. § 4112.02, in order to preserve the Constitutional character of the act.

The courts below have accepted Ward's view that he is required by his religious beliefs to wear a monk's habit. The interpretation of the Ohio Civil Rights Act below has granted Ward's religious view a higher status than the religious doctrine of Appellants. The construction of the Ohio Civil Rights Act by the courts below violates the rule that no court in the United States will choose between competing religious views, a rule mandated by the First Amendment, followed in every other jurisdiction of this country, and heretofore followed in Ohio.

In addition to the very substantial constitutional question of whether a Church must be exempt from the operation of the Ohio Civil Rights Act, this case raises an additional issue of

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public or great general interest: that is, whether an award of attorneys fees can survive the reversal of the statutory and punitive justification therefor.

STATEMENT OF THE CASE AND FACTS

This action arises from the decision of Appellants, Our Lady of Victory Catholic Church and its Pastor, Father John Hengle, ("Father Hengle") not to continue the employment of Appellee "Brother" Gabriel Ward. Our Lady of Victory Parish located in Tallmadge, Ohio took the action

of not renewing "Brother" Ward's continued employment because Mr. Ward refused to cease wearing a religious habit (consisting of a tunic, capuche, cord and rosary) while working at the parish church. This habit, worn by Ward. is the symbol and garb of a "Religious", that is, a member of a religious order (e.g., Franciscans, Dominicans, Jesuits, Maronites, etc.)

Mr. Ward had sought to establish a religious order sanctioned by the Catholic Church for over fifteen years, from 1979 to 1994. However, he was never able to meet the criteria required by Cannon Law, the law of the Catholic Church, to establish such an order. Although he and his followers intimate that they adhere to the rule of the Franciscan Order, "Brother" Ward had not sought an affiliation with the Franciscan Order and, in fact, did not, at all times relevant hereto, belong to any religious order recognized by the Catholic Church.

In 1980 the Cleveland Catholic Diocese granted to Mr. Ward and the religious community he sought to establish, called "The Brothers of the Annunciation of Mary", a limited sponsorship as a union of lay persons, an experimental status for a possible religious community. This status allowed Mr. Ward to wear a habit "internally", but not in public. However, the community envisioned by Mr. Ward never grew and the Diocese withdrew its sponsorship, as

well as his limited right to wear religious garb.

After the Cleveland Diocese withdrew its recognition

of Mr. Ward and his group, Mr. Ward switched his allegiance from the Roman Rite of the Catholic Church to the Maronite Rite of the Catholic Church and petitioned Bishop Zayek of the Diocese of St. Mary in Brooklyn, New York for recognition. The Diocese of St. Mary acted favorably upon the petition of Mr. Ward and. like the Cleveland Catholic Diocese, granted him an experimental status.

On December 31, 1993, the Diocese of St. Mary also withdrew its sponsorship of the Brothers of the Annunciation of Mary because the community was not growing. As a result of the Diocese of St. Mary's withdrawal of its official recognition, Mr. Ward was no longer authorized to wear religious garb by or in the Catholic Church.

Father Hengle has been the Pastor of Our Lady of Victory church since July 1, 1993. Our Lady of Victory is a Roman Catholic church within the Diocese of Cleveland and is subject to the Bishop of Cleveland. When Father Hengle first became the Pastor of Our Lady of Victory Church. Mr. Ward was already employed there. Mr. Ward was responsible for bookkeeping, payroll and accounts payable, in June 1994. Father Hengle met with Mr. Ward to discuss renewing Mr. Ward'semployment contract. By that time the Cleveland Diocese had informed Mr. Ward that he was not authorized to wear religious dress. Cannon law the law of the Catholic Church confers upon the Bishop of a Diocese the right to recognize who is and who is not a "religious."

On June 28, 1994, Father Hengle informed Mlr. Ward that Father Hengle was required to obey the directives of the Diocese concerning Mr. Ward's dress in religious garb while employed on the grounds of the parish. Father Hengle made

it clear to Mr. Ward that as a condition of

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future employment with Our Lady of Victory Parish, Mr. Ward was not to wear his habit while working there and could not insist upon being addressed as "Brother". Mr. Ward refused to abide by these conditions. Consequently, Father Hengle refused to enter into an employment contract with Mr. Ward as a result of Mr. Ward's insistence on dressing in a religious habit and acting in a manner directly contradictory to the directives of the Bishop of the Cleveland Diocese.

In filing his civil action in the Court of Common Pleas of Summit County against The Cleveland Catholic Diocese, Our Lady of Victory Parish and Father John Hengle, Mr. Ward claimed that he was the victim of religious discrimination because he, who was not a member of a sanctioned religious community within the Catholic Church, was not permitted to wear religious dress while working on the grounds of Our Lady of Victory Parish.

Plaintiff alleged in his Complaint that The Cleveland Catholic Diocese, Father John Hengle and Our Lady of Victory Parish had violated his rights under both the Federal and Ohio Civil Rights Act and sought to recover both compensatory and punitive damages. After cross motions for summary judgment were heard and denied, this case proceeded to jury trial on April 10, 1996. A the close of Plaintiff's case in chief and at the close of all the evidence. Appellants moved for a directed verdict. The trial court overruled these motions. On April 15, 1996 the jury returned a verdict in favor of Mr. Ward, finding violations of Federal

Civil Rights Act and Ohio Civil Rights Act, and awarded both compensatory and punitive damages.

A final judgment was not immediately entered because the issue of the amount of Plaintiff's attorney fees to be awarded yet pended. Prior to the verdict the parties had stipulated that should a violation of the Federal Civil Rights statute be proven or should the jury find

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malice and award punitive damages, the trial judge would determine the appropriate award of attorney fees. After the trial court ruled on the attorney fees, Appellants moved for judgment notwithstanding the verdict. When the trial court denied Appellants' motion they appealed to the Court of Appeals for Summit County, Ninth Judicial District.

The Court of Appeals found that the Appellants were exempted from the operation of the Federal Civil Rights statute, but that the exemption did not apply to the Ohio Civil Rights statute. The Court of Appeals reduced the amount of compensatory damages and reversed the entirety of the punitive damages as being against the manifest weight of the evidence. These decisions reversed the two justifications for the award of attorney fees by the trial court. Despite removing all justifications for an award of attorney fees, the Court of Appeals did not reverse the award of attorney fees. The Appellants' subsequent motion to reconsider the specific issue of the award of attorneys fees was denied.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: An Employment Decision Arising From a Doctrinal Dispute Within A Church Is A Matter Of Internal Church Governance And Cannot Raise, Because Of The First Amendment To The Constitution Of The United States, A Justiciable Issue for a Civil Court.

It is respectfully submitted that a State Court should not have exercised jurisdiction over the issue of religious discrimination raised by Plaintiff's Complaint. The mere exercise of jurisdiction by a civil court violated Appellants' First Amendment Rights and constitutes an impermissible entanglement between Church and State. Respect for the free expression and

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exercise of religion is a fundamental tenet of U.S. Constitutional Law. In a decision that predates the First Amendment's application to the States through the Fourteenth Amendment. the United States Supreme Court held:

> In this country the full and free right to entertain any religious belief. to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. ... All who unite themselves to such a body [the church] do so with an implied consent to [its] government, and

> are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them [sic] reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, **that those decisions should be binding in all cases of ecclesiastical colinizance, subject only to such appeals as the organism itself provides for.**

Watson v. Jones (1871), 80 U.S. (13 Wall.) 679, 728-29, 20 L.Ed. 666, 676-77 (emphasis added). By submitting this action to a jury, the Trial Court decided against the weight of 127 years of jurisprudence, and allowed a secular jury to decide that it was a higher authority than the Catholic Church concerning the governance of the Cleveland Catholic Diocese.

The rule established in *Watson, supra,* became a matter of constitutional proportion applicable to the states in *Kedroff v. St. Nicholas Cathedral* (1952), 344 U.S. 94 in which the court observed:

> The opinion [*Watson*] radiates ... a spirit of freedom for religious organizations, and independence from secular control or manipulation -- in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

Id. at 116 (Emphasis added.); *see also, Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* (1969), 393 U.S. 440.

In *Serbian Orthodox Church v. Kelemen* (1970), 21 Ohio St.2d 154, this Court

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determined a property dispute between two ecclesiastical bodies in light of the Supreme Court of the United States' decision in *Hull Memorial, supra.* Applying the First Amendment Establishment Clause principles enunciated in *Hull Memorial,* the Ohio Supreme Court observed:

> While we recognize that these matters of internal church organization are chronic sources of disagreement for the parties and are frequently mentioned in the pleadings, briefs and arguments . . . the *Hull Memorial* case offers the strong suggestion that civil courts cannot constitutionally determine matters of church government. (Emphasis added.)

Kelemen at 159.

The Bishop of the Diocese of Cleveland, not a trial court nor a jury, has the authority to issue directives as to who may dress as a religious within the Diocese of Cleveland. Such was the thrust of *Dragelevich v. Ragasich* (Crt. ofApp. Mahoning Cty. 1970), 24 Ohio App.2d 59 which held:

> 1. The First Amendment to the United States Constitution prohibits civil courts from adjudication of controversies over religious doctrine and practice.
>
> 2. Religious organizations have the power to decide matters of church government for themselves, free

from state interference ....

> 3. In the absence of fraud, collusion, or arbitrariness, the decisions of proper church tribunals on matters purely ecclesiastical, such as the appointment of a clergyman, although affecting civil rights, are accepted in litigation before the secular courts as conclusive.

Id. at ¶¶ 1-3 of the syllabus.

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Proposition Of Law No. 2: A Church Has A Constitutional Right To Make Certain Employment Decisions Based Upon Religious Considerations. Thus, There Must Be An Implicit Exemption For Religious Organizations Found In Ohio Civil Rights Act, R.C. §4112.1 Et Seq

The decision of the Court of Appeals that the exemption for religious organizations from claims of religious discrimination found in the federal law is not found in R.C. §4112.02(A) noted that no Ohio State court had yet ruled on this question. The Court of Appeals then accepted the reasoning found in *Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm.* (6th Cir. 1985), 766 F.2d 932, *rev 'd on other grounds,* 477 U.S. 619 (1986), that, based on two exemptions expressly stated for religious organizations in other parts of the statute, the Ohio legislature's failure to provide a similar exemption as that found in Title VII was by design, and the legislature did not intend the Federal exemption to apply. **But the *Dayton Christian Schools* Court**

then determined that absent the exemption R.C. §4112 was unconstitutional as applied to a religious employer's decision based on religious doctrine. *Id.* at 944-62.

The U. S. Supreme Court reversed the 6th Circuit in *Dayton Christian Schools* on the grounds that the state administrative and judicial processes were the first appropriate forums for the substantive constitutional challenge. *Ohio Civil Rights Comm v. Dayton Christian Schools. Inc.* (1986) 477 U.S. 619, 629. The Court noted that the OCRC's investigation did not violate the Constitutional rights, "if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Id.* at 628. But this is the distinction the Court of Appeals in the case *sub judice* has failed to recognize: it is a fundamental burden on a church to be forced to employ a person against that church's doctrine.

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What the Summit County Court of Appeals has failed to consider is the distinction and balance that must be made between the statutory rights of one individual and the civil liberties, found in the Constitution, of others.

> Thus, the Ohio General Assembly, by legislative enactment effective July 27, 1959, [Ohio Civil Rights Act] gave to those persons whose civil rights were violated, a legally enforceable claim against the violator. This enactment, however, was not expressive of any legislative intent to interfere with the preservation of the constitutional assurances that prevent government encroachments. And it is this

> balance between civil rights as claims, and civil liberties as immunities, that the courts must weigh carefully and judiciously in all controversies such as the case at bar.

Sowers v. Ohio Civil Rights Comm. (Court of Common Pleas, Trumbull County 1969), 20 Ohio Misc. 115, 133-34.

The judgment of the Courts below are an affront to the First Amendment rights of the Catholic Church. One hundred and twenty-seven years of American jurisprudence have "... affirmed the fundamental right of churches to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Equal Employment Opportunity Commission and Elizabeth McDonough v. Catholic University of America* (D.C. Cir. 1996), 83 F.3d 455, 462 (quoting *Kedroft, supra.* 344 U.S. at 116). The Court of Appeals in *McDonough* affirmed the District Courl's dismissal of an employment discrimination action similar to the instant case. The EEOC and Sister McDonough claimed sex discrimination against Catholic University over the decision not to grant her tenure. The District Court determined, and the Court of Appeals agreed, that applying Title VII "would violate both the free exercise and the establishment clauses of the First Amendment]." *Id.* at 460 (internal cites deleted). The *McDonough* Trial Court **dismissed the case before reaching the merits** because judicial determination would constitute, and the "investigation by the EEOC has constituted excessive

entanglement with religion." *Id.* (internal cites deleted).

Concerning the impermissible entanglement with religion that violates the establishment clause of the First Amendment, the *McDonough* Court reminded that entanglement occurs in situations "where a protracted legal process pits church and state as adversaries." *Id.* at 465 (internal cites deleted). The Circuit Court affirmed the District Court's finding that it is not reasonably possible nor legally permissible for a lay trier of fact to evaluate competing opinions on religious subjects. *Id.*; *see also, Amos, supra.*

The very requirements of establishing a prima facie case of employment discrimination show this case cannot be decided without involving church doctrine.

> The employee bears the burden of establishing a prima facie case. and sustains that burden by showing that he holds a sincere religious belief that conflicts with an employment requirement: that he has informed his employer of the conflict: and that he was discharged or disciplined for failing to comply with the conflicting requirement. . . . Once a prima facie case is established, the burden shifts to the employer to show that it could not reasonably accommodate the employee without undue hardship. . . . To require an employer to bear more than a de minimis cost in order to accommodate an employee's religious beliefs is an undue hardship. *Cooper v. Oak Rubber Company* (6th Cir. 1994). 15 F. 3d 1375, 1378 (intenal cites deleted).

Appellee has argued and has prevailed in the Courts below on the theory that his beliefs are more important than those of the Catholic Church But, as Ward has understood

from his 15 year history of complying with Appellants' religious beliefs in the matter of religious dress, the **conflicting employment requirement at issue was entirely a religious, doctrinal requirement. It is clearly an undue hardship to require a church to make an accommodation that violates its own doctrine.**

The decision of the Courts below to favor Appellee's right to exercise his religion at the expense of Appellants' right to exercise their religion is at odds with the fundamental

constitutional protection of"each person's right to believe as he wishes and to practice that belief according to the dictates of his conscience **so long as he does not violate the personal rights of others."** *Little vs. Wuerl* (3rd Cir., 1991), 929 F.2d 944, 947 (citing *Sherbert vs. Verner* (1963), 374 U.S. 398) (emphasis added).

Proposition Of Law No. 3: An Award Of Attorney Fees Can Only Be Based Upon Specific Statutory Authorization Or As Part Of A Punitive Damage Award. An Award Of Attorney Fees May Not Survive The Appellate Court's Reversal Of The Statutory And Punitive Grounds Upon Which The Award Was Based.

The award of attorney fees to the Plaintiff by the Trial Court cannot be separated from two of the issues objected to at trial and expressly raised on appeal: (1) that Appellants are exempt from the operation of the federal statute, Title VII of the Civil Rights Act of 1964; and (2) that there was no basis

for the award of punitive damages to Plaintiff. Because Appellants' objections to any award based on the federal statute and to any award of punitive damages were upheld by the Court of Appeals, this Court should follow the unquestioned Ohio law that attorney fees are not authorized without the requisite award of punitive damages.

As the Court explained in *Digital & Analog Design Corp v. North Supply Co.* (1992), 63 Ohio St.3d 657, 662. absent statutory authorization there is no distinct action for attorney fees. The Court further explained:

> The award of attorney fees, although seemingly compensatoryand treated as such in a model jury instruction, does not compensate the victim for damages flowing from the tort. Rather, that a party pay attorney fees under these circumstances is a punitive (and thus equitable) remedy that flows from a jury finding of malice and an award of punitive damages. There is no separate tort action at law for the recovery of attorney fees under these circumstances. **Without a finding of malice and award of punitive damages,**
>
> [12]
>
> **plaintiff cannot justify the award of attorney fees, unless there is a basis for sanctions under Civil Rule 11.**

Id. (emphasis added).

It is somewhat disingenuous for Appellee to stipulate, as he has done, that the Trial Court may determine an award

of attorney fees conditioned upon Plaintiff's prevailing on either his claim for violation of Federal law or his claim for punitive damages, and then, when those claims are reversed as a matter of law, to argue that the award of attorney fees nevertheless survives.

"In order to award attorney fees in the absence of statutory authorization, a jury must make a finding of malice and award punitive damages.[2] The award of attorney fees to Appellee by the Trial Court cannot, based merely on Appellee's rhetoric, be converted into a distinct claim and cause of action. Attorney fees have no independent life. Their only existence is that which they derive from statute or from an award of punitive damages. Clearly, the attorney fees awarded to Appellee in the instant case cannot survive the Court of Appeals Decision and Journal Entry of December 10, 1997.

CONCLUSION

Because any religious tenet or practice can be viewed by persons outside that particular religious denomination as dogmatically archaic, unnecessarily ritualistic, and out of step with the "enlightenment" of the secular world, the Founding Fathers, the drafters of the Constitution, and the Supreme Court. Jurists have mandated that civil courts abstain from involving themselves in decidedly church matters. Further, and perhaps more importantly, an incursion by the Courts into

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[2] *Ayer v. Ayer* (Court of Appeals Hamilton County, February 20, 1997), unreported, Nos. C-940762, C-970764, 1097 WL 71291 (internal cites deleted) (attached hereto).

matters of church governance is not without Constitutional ramifications. The incursion

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creates an entanglement between church and State that is at loggerheads with the historical and philosophical fabric of our country. That is precisely why the trial court should have refused to exercise jurisdiction over Appellee's claim of religious discrimination against the Cleveland Catholic Diocese and Our Lady of Victory Catholic Church.

Appellants respectfully request this Court to accept jurisdiction of this case to review the significant constitutional issues that this case presents.

Respectfully submitted.

By:_____
Orville L. Reed, III. Counsel of Record

ATTORNEY FOR APPELLANTS,
FATHER JOHN HENGLE, et al.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of January 1998, a true and correct copy of the foregoing Memorandum in Support of Jurisdiction was sent by U.S. First Class Mail, postage prepaid, to Richard E. Dobbins. Esq., and Nicholas Swyrydenko. Esq., Attorneys for Plaintiff-Appellee, at Dobbins & Associates, Ridgewood Center, Suite 105, 1000 South Cleveland-Massillon Road,

Supreme Court No. 98-167

Akron, OH 44333.

Orville L. Reed, III

ATTORNEY FOR APPELLANTS,
FATHER JOHN HENGLE, et al.

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APPENDIX W

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

Dated April 12, 1996

GABRIEL M. WARD,	) CASE NO. 94-10-3522
Plaintiff,	) C. A. NO. 18234
	) Volume 1 (of 3)
vs.	) **TRANSCRIPT OF**
	) **PROCEEDINGS**
FATHER J. HENGLE,	)
et al.,	)
Defendants.	)

APPEARANCES:

RICHARD DOBBINS and NICHOLAS SWYRYDENKO
Attorneys at Law, On Behalf of the Plaintiff.

ORVILLE REED,
Attorney at Law, On Behalf of the Defendants.

- - -

BE IT REMEMBERED that upon the hearing of the above-entitled matter in the Court of Common Pleas, Summit County, Ohio, before the Honorable Michael T. Callahan,

Judge Presiding, commencing on April 12, 1996, the following proceedings were had, being a Transcript of Proceedings:

MAXINE A. HOSCH, RPR
Official Court Reporters
Summit County Courthouse
Akron, Ohio 44308

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asked not to misrepresent what, in fact, he is.

I think you will find from the evidence in this case, ladies and gentlemen, that Mr. Ward is entitled to no money from this jury and you will determine that justice, truth, common sense require you to return a verdict in favor of the Defendants.

Thank you.

THE COURT: Thank you, Mr. Reed.

Mr. Dobbins or Mr. Swyrydenko, call your first witness.

MR. DOBBINS: Father Gabriel.

Do you swear or affirm ?

THE WITNESS: Swear.

THE COURT: Will you raise your hand.

- - -

GABRIEL M. WARD

Plaintiff herein, called as a witness, being first duly sworn as provided by law, was examined and testified as follows:

THE COURT: Please be seated.

DIRECT EXAMINATION

By Mr. Dobbins:

Q. Father Gabriel, for the record, will you tell us your name, please?

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A. My name is Father Gabriel Mary Ward, also known as Edward Paul Ward.

Q. What is your current address?

A. 51 North perry Road, New Riegel, Ohio.

Q. What is your trade or occupation?

A. I'm a religious Orthodox priest in the diocese of Mary Our Queen of the Orthodox -- Autocephalous Orthodox Church of the United States.

Q. How old of a man are you?

A. I'm 42.

Q. What year were you born?
A. 1954.

Q. Where were you born?

A. In Cheyenne, Wyoming.

Q. Where did you grow up as a child?

A. I grew up in Modesto, California, also Cortland, New York, and then I went to college in North Canton, Walsh University.

Q. Your mother and father, are they still alive?

A. Yes, they are.

Q. What do your mother and father do for a living?

A. Both are retired presently but most of their lives, most of the life that I have known them, they were teaching school.

Q. Do you have siblings?

* * * *